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No._____

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1992

THE TEXAS FRUIT PALACE, INC.,
Petitioner,
v.
CITY OF PALESTINE,
Respondent.

Petition For Writ Of Certiorari
To The Court of Appeals for the
Twelfth Supreme Judicial District of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Absent Congressional authorization, can a state (or a political subdivision thereof) condemn property in support of a function delegated exclusively to the federal government in the Constitution of the United States - e.g. the postal function.

LIST OF PARTIES

The parties at interest are The Texas Fruit Palace, Inc. who was defendant in the trial court; and the City of Palestine, Texas (City), which was plaintiff in the trial court.

The Attorney General of Texas was made a party in the trial court, due to the claim that a state statute is partially invalid as being contrary to the Constitution of the United States. An appearance was made and it was announced in open court that the state did not wish to participate. Even so, 28 USC §2403(b) may be applicable and the Attorney General of Texas has been served.

A portion of this case is pending in the United States District Court for the Eastern District of Texas, wherein the United States of America and the United States Postal Service are parties. Although technically not parties herein, they have vital interests in the outcome of this proceeding (see pg. 3-6, *infra*) and have been served.

Rule 29.1 Statement

Petitioner, The Texas Fruit Palace, Inc., is a not for profit corporation which has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

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Petition For Writ Of Certiorari To The Court of Appeals for the Twelfth Judicial District of Texas

PETITION FOR WRIT OF CERTIORARI

The Texas Fruit Palace, Inc., Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Twelfth Supreme Judicial District of Texas. The Supreme court of that state having denied writ of error therein.

OPINIONS BELOW

The final opinion and judgment entered in this cause was that of the Twelfth Supreme Judicial District of Texas, which is an intermediate Court of Appeals between the trial court and the Texas Supreme Court. Said judgment was adverse to Petitioner and appears in 842 S.W.2d 319. (Appendix A). A motion for rehearing was filed and overruled. (Appendix B).

A writ of error was taken to the Supreme Court of Texas and denied (Appendix C). A motion for rehearing was denied (Appendix D).

BASIS FOR JURISDICTION

The judgment of the court of appeals was entered on August 31, 1992. Rehearing was denied on January 6, 1993. Writ of Error to the Supreme Court of Texas was denied on April 21, 1993. Said Court denied a motion for rehearing on the 19th of May, 1993. It is on this last date that the judgment of the state courts became final. This court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The specific constitutional provision involved is U.S. CONST. art. I, § 8, cl. 7. Because of the pari materia relationship of clause 7 to other clauses under section 8, all of said section is reproduced at Appendix G.

The state statute involved is TEX. CIV. STAT. ANN. art. 5248(e). This article has been reproduced in its entirety in Appendix E. The court is advised that since the initial action in this case, said article has been codified and may now be found in TEX. LOC. GOV. CODE § 280.001 (Vernon 1988). This is reproduced in pertinent part in Appendix F.

The provision granting the power of eminent domain to the United States Postal Service (USPS) is 39 U.S.C. 401, and is reproduced in pertinent part in Appendix H.

STATEMENT OF THE CASE

The Petitioner is a not for profit corporation, the charter of which states:

> The purpose for which it is formed is the encouragement of Agriculture and Horticulture, and the maintenance of public fairs and exhibition of livestock and farm products.

The Petitioner (sometimes hereinafter referred to as the Fair) utilized and occupied some 13.034 acres of land owned by Respondent under a fifty year lease, which was executed in 1947. The term was extended by an amendment in 1952 until the year 2007.

It became known to the Fair that USPS was seeking between 6.50 and 9.20 acres in order to build a new postoffice and that the City and USPS were negotiating for the former to acquire the premises leased to the Fair for the latter. Attorney for the Respondent, Mr. Charles Nichols, entered on behalf of the City a Contract of Sale with USPS. Pursuant thereto, the City in March, 1987 passed a resolution which read in pertinent part:

RESOLUTION NO. R-30-87

* * * * *

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Palestine, Texas:

> **SECTION NO. 1:** That the City Attorney is hereby authorized and directed to have the leasehold interest, if any, in the Fairground property described in Exhibit "A", attached hereto appraised and to offer the appraised price to the Texas Fruit Palace, Inc., for its leasehold interest, if any, and if such price is not accepted, the City Attorney is authorized to institute eminent domain proceedings to

> acquire said property, for the use of the United States Government, to-wit: a post-office.

Upon first learning of the condemnation, the Fair contested the validity of the condemnation by seeking an injunction in the Federal District Court for the Eastern District of Texas, Tyler Division (the Honorable William Wayne Justice, sitting), on the grounds that the purpose of the condemnation was exclusively federal under the Constitution of the United States. Such injunction was denied by order entered June 15, 1987 on the grounds the Fair had an adequate remedy at law.[1] The court stated that the constitutional arguments could be raised prior to passing title[2] or on appeal.

One week later, on June 22, 1987, the City (Respondent) discovered that it had a need for such of the property as the Postal Service did not want. A second condemning ordinance was then passed. It provided in pertinent part:

RESOLUTION NO. R-37-87

* * * * *

> **Section 2:** The City of Palestine, Texas is the owner of 13.034 acres described in Exhibit "A", attached hereto, and incorporated herein fully. The Texas Fruit Palace, Inc., claims a leasehold interest in said property, which

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[1]Said order is reproduced in Appendix I

[2]Title does not pass under Texas law in a contested condemnation case until final judgment has been entered. See pg. 24.

> claim is disputed by the City of Palestine, Texas. The City of Palestine, Texas, intends to acquire possession of the property free and clear of any encumbrances for the purpose of conveying a portion of said property to the United States Government for a regional postal facility. Further, public convenience and necessity requires that possession of the property be acquired free and clear of any encumbrances for the following public purposes: city offices, city warehouses, city equipment barn, city maintenance garage, city storage yard, city indoor storage buildings, parking facilities, and streets and alleys.

The City finds authority to condemn for the federal government in TEX. CIV. STAT. ANN. art. 5248(e).[3] It duly proceeded with the eminent domain proceedings and commissioners were appointed, who determined the value of the leasehold estate to be $160,000.

Pursuant to a pre-existing contract, Mr. Nichols executed a deed to the USPS on October 14, 1987 to 7.0353 acres of the land for a recited consideration of $226,458. The City occupies the rest with considerable improvements thereon and, of course, enjoyed a gain of approximately Fifty One Thousand Four Hundred Fifty Eight ($51,458).[4]

The Fair impleaded USPS in the suit on December 17, 1987. USPS removed the proceeding to the United States District Court for the Eastern District of Texas. Prior

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[3]Said statute has now been codified: TEX. LOC. GOV. CODE § 280.001 (Vernon 1988), reproduced in pertinent part in Appendix F.

[4]A jury actually awarded Petitioner $175,000.

to trial, the United States of America was made a party. It was not until trial began, apparently, that the court realized that the validity of a state condemnation was at issue.[5] A finding that a claim of invalidity under state law was not well founded, would not, of course, diminish the constitutional claim. Even so, the court severed the parties and the non-federal parties were sent back to state court,[6] apparently under the doctrine of *Key v. Wise*, 629 F.2d 1049 (5th Cir. 1980) *cert. denied*, 454 U.S. 1103, 70 L.Ed. 647 (1981).[7]

The Fair took strong exception to the action of the federal trial court in severing the parties and filed mandamus to the Court of Appeals for the Fifth Circuit. Mandamus was denied. Certiorari was then sought to this Honorable Tribunal (The Texas Fruit Palace v. Honorable William M. Steger, No. 89-145). This was also denied. Thus, a portion of the case is pending in the Federal District Court for the Eastern District of Texas.

Under *Key v. Wise,* the determination of title - i.e. the validity of the condemnation - will be res judicata on the federal court case. Succinctly stated, two federal courts have declined to consider the constitutional issue raised. The state appellate court has stated (at pg. 9a) that "By enacting this provision [5248(e)], the Texas Legislature has declared that land used by the United States Government is a 'public use'. The legislatures enactment is not violative of any state or federal constitutional powers on the right of eminent domain."

There the matter stands.

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[5]The other issues were questions of state law and are now moot.

[6]A copy of this order is reproduced in Appendix J

[7] Once the case was removed to state court, the Attorney General of Texas was joined on March 16, 1990.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PUTS AT ISSUE FUNDAMENTAL QUESTIONS REGARDING THE FEDERAL-STATE RELATIONSHIP AND THE DIVISION OF POWERS.

A. THE STATE-FEDERAL RELATIONSHIP HAS BEEN DEFINED AS CONSISTING OF TWO GOVERNMENTAL SPHERES - ONE FEDERAL AND ONE STATE.

This case concerns a trespassing postoffice, built on land taken for federal use under state rather than federal law. The USPS abdicated its own right to condemn the leasehold estate. Instead it entered a contract with the City of Palestine to purchase the premises, once the City had condemned them, for the stated purpose of conveying a portion thereof to USPS for a regional postoffice.

The City acted under a state statute similar to that existing in several states which grants to the states, authority to condemn land for the use of the government of the United States.[8] The legal question presented, then, is **whether or not a state (absent congressional authority) can condemn property for a purpose that is exclusively federal**. Such exclusivity arises in the instant cause, under the Constitution of the United States, article I, section 8, clause 7, wherein the states ceded to the federal government the authority to establish postoffices and post-roads. The implications of this case are broader than the statutory intrusion into the postal area, since all powers delegated under section 8 would appear to be in pari materia.

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[8]See Appendix K for reference to condemnation statutes of selected states.

Under our federal form of government it is well established that there were two separate governments - each with its respective area of responsibility. This is not only true from a historic perspective, but has become an established principal of constitutional law. *Ableman v. Booth*, 21 How. 523, 16 L.Ed. 169 (1859); *Kohl v. U.S.*, 91 U.S. 367, 23 L.Ed. 449 (1876); *Ponzi v. Fessenden*, 258 U.S. 254, 261, 66 L.Ed. 607, 42 S. Ct. 309 (1922); *Feldman v. U.S.*, 322 U.S. 487, 88 L.Ed. 1408, 64 S. Ct. 1082 (1944). See also *Covell v. Heyman*, 111 U.S. 176, 28 L.Ed. 390 (1884).

In *Ableman*, Chief Justice Taney stated [L.Ed. at 173]:

> The powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye.

The Supreme Court next stated the principal in *Kohl*, 91 U.S. 367; 23 L.Ed. 449 (1876). It was not initially clear that the federal government could exercise the right of eminent domain within a state without the concurrence of the state wherein the property was located. It was the practice to proceed in a state court and under a state statute. See *Rockaway Pacific Corp. v. Stotesbury*, 255 F. 345, 351 (D.C.N.Y. 1917). Under this procedure two different lines

of authority developed. One line was exemplified by *Gilmer v. Lime Point*, 18 Cal. 229 (1861) and *Burt v. Merchants Ins. Co.*, 106 Mass. 356. (1871) The other was exemplified by *Trombley v. Humphrey*, 23 Mich. 471, 9 Am. Rep. 94 (1871).

In *Gilmer* the federal government wanted to construct a fortification in the state of California. There was a California statute which in effect gave jurisdiction to the state district courts wherein condemnation proceedings could be initiated upon the application of an authorized agent of the United States, in order to acquire land for various purposes including lighthouses, naval yards and fortification. Acting under such authority the California state court upheld the authority of the state to condemn on behalf of the federal government for a fort.

In *Burt*, a similar procedure was followed. There Mr. Burt, an agent of the United States, instituted proceedings in the state court of Massachusetts pursuant to a state statute which authorized the federal government to purchase a parcel of land in the City of Boston for the erection of a postoffice and other federal buildings. The statute further provided that if no agreement could be reached between the agent of the federal government and the land owner application could be made in the state court for fixing the price toward the end of taking the land. In other words, it was a procedure in eminent domain. The state court upheld the constitutionality of the state statute authorizing the taking, under state law and utilizing the courts of the commonwealth.

In *Trombley v. Humphrey*, 23 Mich. 471, 9 Am.Rep. 94 (1871) the opposite result obtained. The Michigan legislature passed an act authorizing the legislature to condemn land for the federal government for the erection of a lighthouse. *Trombley* states at 475:

> The states of this Union possess the eminent domain for all legitimate purposes under their own sovereignty. They may take and appropriate lands for roads, canals, statehouses, courthouses, schoolhouses and many other purposes needful to enable them to accomplish the objects for which their governments have been created for their people. But there are other public objects which, though to be accomplished within their territorial limits, are just as much beyond the scope of the eminent domain as possessed and exercised by them, as they would be if to be accomplished within the exclusive jurisdiction of a foreign nation. Under the division of powers between the United States and the individual states, each has its sphere of sovereignty, ... For the one to enter the sphere of the other and employ its officers and machinery in the exercise of its eminent domain for the benefit of the other would not only be as much without warrant, but also as much a work of supererogation, as for the United States to exercise the like authority and employ the like agencies in a foreign country in order to appropriate individual property therein for the benefit of the government of such foreign country, which as a sovereignty, had powers of its own fully adequate to the purpose.

In 1876, the United States Supreme Court decided, *Kohl, supra*. The Federal Government desired to appropriate a lot in the City of Cincinnati for a site for a postoffice and other public buildings. The Plaintiff in Error therein owned a perpetual leasehold estate on a portion of the property. Justice Strong who wrote the opinion stated that:

> Chief Justice Taney [in *Ableman* - pg. 8, *supra*] described in plain language the complex nature of our government, and the existence of two distinct and separate sovereign cases within the same territorial space, each of them restricted in its power, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other.

The Court then holds:

> In some instances, the states, by virtue of their own right of eminent domain, have condemned land for the use of the general government, and such condemnations have been sustained by their courts, without, however, denying the right of the United States to act independently of the states. Such was the ruling in *Gilmer v. Lime Point*, 18 Cal. 229, where lands were condemned by a proceeding in a state court and under a state law for a United States fortification. A similar decision was made in *Burt v. Merchants Ins. Co.*, 106 Mass. 356, where land was taken under a state law as a site for a postoffice and a sub-treasury building. Now in *Trombley v. Humphrey*, 23 Mich. 471, a different doctrine was asserted, founded, we think upon better reasons. **"The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity, which alone is the foundation of the right".** (emphasis added).

Is there not a general principal of law established by these four holdings of the United States Supreme Court (*Ableman, Kohl, Ponzi and Feldman*)?

Did *Kohl* not effectively overrule *Gilmer* and *Burt* and the practice of using the state court system to acquire land for purposes that are **exclusively** federal?

The Petitioner answers the questions "yes". The Honorable Court below answers these questions "no".

The holding in *Kohl* clearly places the postal function exclusive within the federal sphere. Were it otherwise the practice followed in *Gilmer v. Lime Point, supra* and *Burt v. Ins. Co.* would have been upheld and that of *Trombley v. Humphrey* rejected, not vice versa.

The *stare decisis* effect of *Kohl* and *Ableman* was recognized in *Darlington v. U.S.*, 82 Pa. 382, 22 Am.Rep. 766 (1877). Here there was Congressional authorization for the acquisition of a site in the City of Pittsburgh for the erection of a building to be used as a federal courthouse, customs house, and postoffice. If the site could not be purchased, condemnation was to proceed under the condemnation laws of Pennsylvania. The Supreme Court of Pennsylvania held that the property could not be taken by the state, citing *Trombley* and *Kohl* as authority.

The matter was succinctly stated in *Ex Parte Rapier*, 143 U.S. 110, 36 L.Ed. 93 (1892):

> The states before the Union were formed could establish postoffices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided

> for purposes supposed to exert a demoralizing influence upon the people. **When the power to establish post offices and post-roads was surrendered to the Congress it was complete power, and the grant carried with it the right to exercise all the powers which made that power effective. (emphasis added)**

The plenary nature of the postal authority is further demonstrated by the fact that a state can not require one who transports the mail on its highways to have a drivers license. One Johnson, an employee of the Postal Department, was transporting the mail over a highway (post-road) and was arrested in Maryland for driving with out a license. He was tried and convicted. The High Court, in an opinion by Justice Holmes, reversed on the grounds that it was an infringement on the postal function. *Johnson v. Maryland*, 254 U.S. 51, 65 L.Ed. 126, 41 S. Ct. 16 (1920).

Other examples of the exclusivity of federal power are seen in *U.S. Postal Service v. Brennan*, 574 F.2d 712 (2nd Cir. 1978) - private individual was delivering mail in the City of Rochester, New York cheaper than the postal service; *Thanet Corp. v. Board of Adjustment*, 249 A.2d 31 (N.J. 1969) - postoffice not subject to zoning ordinance.

At this juncture at least two reasons for granting certiorari appear. First the decision below is in clear and direct conflict with the Supreme Court of Pennsylvania, in *Darlington v. U.S.*, 82 Pa. 382, 22 Am.Rep. 766 (1877), *supra*.

Secondly, it would appear that the decision below is in conflict with *Kohl* and the other cases discussed. If the conflict not be direct it is surely in conflict in principal with

(a) *Kohl* and its progeny establishing that the postal function is exclusively federal, and (b) the more fundamental principal of constitutional law which defines the state-federal relationship, as exemplified by *Ableman* and its progeny.

B. SOME FUNCTIONS OF THE TWO GOVERNMENTS ARE CONCURRENT AND SOME ARE EXCLUSIVELY FEDERAL.

In addition to the above, a third reason for granting certiorari is becoming apparent. The decision of the court below substantially departs from the accepted and usual course of the judicial interpretation of our Constitution.

Not only do the cases discussed above establish the validity of this contention, but the wide - indeed universal (since *Kohl*) - acknowledgment of the principal of law there established gives the strongest possible support to the position of the Petitioner. The acknowledgment of this principal finds additional expression in two lines of cases.

The first is where concurrent authority to condemn exists; the second is where the power is exclusively federal, but under express congressional authorization Congress has delegated or "lent" its power to some other entity.

1. INSTANCES WHERE CONCURRENT AUTHORITY EXISTS.

In the case of *VIA v. State Comm. on Conservation and Dev. of Virginia*, 9 F. Supp. 556 (1935), *aff'd*, 296 U.S. 549, 80 L.Ed. 388, 56 S. Ct. 245, the State of Virginia undertook to acquire land for the formation and establishment of the Shenandoah National Park in the State of Virginia. The court specifically reviewed *Kohl, Trombley and Darlington*. It then stated, "it is plain that the operation of a lighthouse, of a postoffice or a federal courthouse is the

exclusive function of the federal government and that these activities are not within the power of the state" [at 561]. The court then went on to hold that condemnation for the park was permissible, since it was not the **exclusive** function of the federal government.

A similar result was reached in *Schooler v. State*, 175 S.W.2d 664 (Tex. Civ. App. --El Paso 1943, writ ref'd w.o.m.). In this case, the State of Texas was attempting to condemn land to convey to the federal government for the Big Bend National Park. *Schooler* challenged the authority of states to condemn land which was to be conveyed to the federal government for a national park. In affirming the right to condemn, the court said:

> The question of a state's power to condemn land for the use of the United States in carrying out the public and governmental functions assigned exclusively to the United States by the Constitution, **as, for example, for a postoffice or custom house**, is not here involved. The function here is dual. (emphasis added).

A case of similar import is *Delaware v. Lang Co.*, 191 A.2d 332 (1963).

2. INSTANCES WHERE THE EXCLUSIVE FEDERAL AUTHORITY IS DELEGATED BY CONGRESS.

The cases in this category demonstrate that the problem is not limited to the postal power but may arise under other of the delegated powers as well. They also establish that Congress may constitutionally call for state assistance in acquiring federal facilities when it (not the state legislature) deems it appropriate:

1. *City of Tacoma v. Taxpayers*, 357 U.S. 320, 2 L.Ed.2d 1345, 78 S. Ct. 1209 (1958). The City of Tacoma wanted to build a dam across an area river. The State opposed the project because it would inundate a state fish hatchery.

The court specifically noted that it was no longer open to question that the federal government under the Commerce Clause of the U.S. CONST. art. I, §8, cl. 3 had dominion to the exclusion of the State, over the navigable waters of the United States. In effect, the United States had by **specific Congressional enactment** provided a mechanism for designating cities or possibly other political entities, to act on its behalf in this **exclusive** federal area. There was specific federal legislation authorizing the procedure, namely the Federal Power Act, 41 Stat. 1063, et seq., 16 U.S.C §§ 791(a), et seq.

2. *City of Davenport v. Three-fifths of an Acre of Land*, 147 F. Supp. 794 (S.D. Ill. 1957), *aff'd*, 252 F.2d 354 (7th Cir. 1958). The Bridge Commission and the City could condemn state owned land, once again pursuant to a specific grant of Congress. Act May 26, 1928 as amended by Act July 16, 1952, 66 Stat. 734; Bridge Act of 1906, § 1-8, 33 U.S.C. § 491-498. This legislation authorized the City to exercise the **exclusive** federal power over navigable streams (bridge over Mississippi River).

3 and 4. Other cases in this category are *Richardson v. Cameron County, Texas*, 275 S.W.2d 709 (Tex. Civ. App. --San Antonio, 1955, no writ); *Vann v. Cameron County, Texas*, 124 S.W.2d 167 (Tex. Civ. App. --El Paso 1939, writ dism'd).

> The basic concept is well stated in *Latinette v. City of St. Louis*, 201 F. 676, 678 (7th Cir. 1912), "states have the power [of condemnation] only for state purposes; the nation only for national purposes"

It is submitted that a review of the cases covered by this sub-section B category, coupled with the cases heretofore cited, demonstrates that the usual and accepted course of judicial conduct recognizes that, absent congressional authorization, a state government cannot exercise authority that is exclusively federal. Indeed, this would appear axiomatic were it otherwise, it would not be exclusive.

The division of powers created by our Constitution make it is essential that no state be permitted, absent Congressional authority, to exercise those powers which our Constitution have delegated exclusively to the federal government. *Spector Motor Services v. O'Connor*, 340 U.S. 602, 95 L.Ed. 573, 71 S. Ct. 508 (1951); *McCullough v. Maryland*, 4 L.Ed. 579, 601 (1819). *Spector* concerned exclusive powers under U.S. CONST. art. I, §8, cl. 3.

II. A COMPARISON OF THE OPINION OF THE COURT BELOW WITH THE NUMEROUS DECISIONS ABOVE WILL MAKE PATENTLY CLEAR JUST HOW FAR THE HONORABLE COURT BELOW HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The Court of Appeals, at page 8a of its opinion, takes the position that neither the Constitution of the United States nor the Constitution of this State can be interpreted so as to limit the power of the state to condemn only for situations deemed by the Courts to be "non-exclusive". Stated differently, the United States Constitution cannot be

interpreted to proscribe a state from exercising, under its own initiative, the power of eminent domain, even though under the Constitution of the United States all powers in the area have been delegated exclusively to the Federal Government.

The Court further holds, at page 7a, "States have been permitted to condemn property for some federal purposes, even when the purpose is a traditionally exclusive federal function". See *Rockaway Pacific v. Stotesbury*, 255 F. 345 (2nd Cir. 1917), *Fishel v. Denver*, 106 Colo. 576, 108 P.2d 236 (1940), *Branch v. Lewerenz*, 75 Conn. 319, 53 A. 658 (1902) and *Burt v. Merchants' Ins. Co.*, 106 Mass. 356 (1871).

It is submitted that the cases upon which the court below rely do not support its conclusion. Were it otherwise, the departure from the usual course of judicial conduct would be less than contended by Petitioner. In order to support its position that no post-*Kohl* cases have been found contrary to that position, an analysis of the cases relied upon by said court becomes necessary.

One of the cases *Burt v. Merchants Ins. Co.*, 106 Mass. 356 (1871) was effectively overruled by *Kohl*, for reasons discussed at pages 9 through 12 *supra*. The remaining three cases upon which the Honorable Court below relies are:

1. *Fishel*: In *Fishel* Congress had in 1937 authorized the establishment in or near Denver of a branch of The Air Corps Technical Training School. (50 Stat. 862, § 2). Fishel, was contesting the condemnation because the land was to be conveyed to the federal government for the purposes above stated. *Fishel* relied upon *Trombley*, *supra* and *Rockaway*

Pacific v. Stotesbury, 255 F. 345 (D.C.N.Y. 1917), *infra*. The court recognized the rule of these two cases but found it inapplicable, because the use was not exclusively federal.

2. *Rockaway Pacific:* *Rockaway Pacific* points out matters of defense have never been interpreted as being a function belonging exclusively to the federal government. By virtue of its citation of *Rockaway Pacific*, it is perceived that the Honorable Court below construes *Rockaway Pacific* to hold just the opposite. If the reading of the Court of Appeals is correct it would give support to its position that courts have sometimes permitted states to condemn for purposes that are exclusively federal. Petitioner has found no case to such effect following the decision by the United States Supreme Court in 1876 in *Kohl*.[9]

In *Rockaway Pacific* the state of New York instituted condemnation proceedings for land to be conveyed to the federal government so the latter could build a fort. The plaintiff sought an injunction on two grounds. It was claimed that there had not been provision for adequate compensation as required by New York law; and further that the state could not condemn on behalf of the federal government on what was claimed to be a function belonging exclusively to the federal government.

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[9]Petitioner is aware of an advisory opinion contrary to its position. *In re Opinion of the Justices*, 8 N.E.2d 753 (Mass. 1937). Such proceedings are advisory in nature and have no binding effect. 20 Am.Jur. 2d, *Courts* § 189; 21 C.J.S. 2d *Courts* § 159.

The matter was heard before three federal judges. Three separate opinions were entered. Two felt injunction should issue conditionally because of the compensation issue. One of these together with a dissenting judge further addressed the ability of the state to condemn for a federal fort.

The two judges who wrote on the authority of the state to condemn land to be conveyed to the federal government for the construction of a fort noted that defense was a concurrent function of both the federal and state government. See also U.S. Const. Amendment II.

It is submitted that *Rockaway Pacific* does not stand for the proposition that a state has authority to condemn for a purpose that is exclusively federal. *Rockaway Pacific* is cited for the position contended for by Petitioner on at least four occasions. *Delfield v. City of Tulsa*, 131 P.2d 754, 759 (Okla. 1942); *State v. Oliver*, 35 S.W.2d 396, 399 (Tenn. 1931); *Schooler v. State*, 175 S.W.2d 664, (Tex. Civ. App. --El Paso 1943, writ ref'd w.o.m.). *Rudacille v. State Comm. on Conservation and Dev.*, 156 S.E. 829, 834 (Va. 1931). *Fishel v. Denver*, 576, 108 P.2d 236 (1940). Petitioner is unaware of any cases wherein the case has been cited to the contrary.

3. *Branch v. Lewerenz*: Here the court discussed the ability of the state to condemn land for the purpose of conveying it to the federal government, but reached no decision thereon. The court held that the Constitutional question could have been raised in a former condemnation proceeding, but was not, and was, therefore, res judicata.

In further reference to the opinion below, the court at page 8a states, "In the light of more recent decisions, we believe the role of the legislature and the judiciary in determining whether the power of eminent domain is being exercised for public purposes, we believe the proper view is to defer to the legislature's declaration of a public purpose unless the purpose is clearly private in nature".

The foregoing is tantamount to saying that the state legislature - not the Constitution of the United States and the decision of the federal courts - is the arbiter of whether or not a function is exclusively federal. This is facially in error under the supremacy clause. U.S. CONST. art. VI.

It must be remembered that, "Decisions dealing with condemnation proceedings are to be considered in the light of the powers possessed by the sovereign seeking to exercise the right." *U.S. v. Certain Lands in the City of Louisville*, 78 F.2d 684, 687 (6th Cir. 1935), *cert. granted*, 296 U.S. 567, 56 S. Ct. 154, 80 L.Ed. 400, *cert. dism'd*, 297 U.S. 726, 56 S. Ct. 594, 70 L.Ed. 1009.

Moreover, as observed *In re Townsend*, 39 N.Y. 171, 174 (1868). "This [the power of the state legislature to determine what constitutes a public use] can hardly be supposed to import, that the legislature can, by its mere declaration, override the Constitution of the United States." Indeed, "if any one proposition could command the universal assent of mankind, we might expect that it would be this - that the government of the union, though limited in its power, is supreme in its sphere of action". *McCullough v. Maryland*, 4 Wheat 316, 4 L.Ed. 579, 601 (1819).

It is essential that no state be permitted to exercise without authority from Congress those functions delegated by

the Constitution exclusively to Congress. *Spector Motor Services v. O'Connor,* 340 U.S. 602, 95 L.Ed. 573, 578 (1951).

III. A POTENTIAL, INTER ALI, FOR RE-OCCURRING CONSTITUTIONAL VIOLATIONS CONSTITUTES A FOURTH REASON FOR GRANTING THE WRIT.

It is submitted that any time an Appellate Court of any state fails to apply fundamental and broadly recognized principals of Constitutional Law, the case is intrinsically important.

The fact that an enormous government entity (USPS) is insensitive to our Constitution adds to this importance. Further, a number of states - whether expressly or tacitly - grant broad powers to their political subdivisions in a manner similar to Texas. The potential for USPS to utilize state surrogates is, therefore, national in scope.

A. THE SCOPE OF THE POSTAL FUNCTION AND THE GRANT OF AUTHORITY IN NUMEROUS STATES SIMILAR TO THAT IN TEXAS.

The postal service requires an immense amount of property. It has some 5603 buildings, containing approximately 120,000,000 square feet of interior space. In addition there is some 93,700,000 square feet of such space leased in 29,679 buildings.[10] This need is undoubtedly not static, and space acquisition is undoubtedly a continuing problem due to attribution, expansion and other factors. How are these needs met? Apparently not through the utilization of the power of eminent domain bestowed on

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[10] West's Fed. Practice Manual §2578 (1991)

USPS by Congress.[11] This power is not utilized except in unusual and compelling circumstances.[12]

Granting, arguendo, that most acquisitions may be negotiated, with such huge property needs, it is virtually inconceivable that the power of eminent domain is not being exercised on behalf of USPS by someone.

In the instant cause, the City of Palestine was available. It is clear that this huge department of government (USPS) is willing to, and has, abdicated the condemnation power given it by Congress if it can find an accommodating surrogate.

The number of potential surrogates, such as the City of Palestine, apparently includes all the states except conceivably five or six. The condemnation statutes of a number of states appear silent on the ability to condemn property for the purpose of conveying it to the federal government and, therefore, contains no proscription against condemning for exclusively federal purposes. At least four states have statutes similar to that of Texas here at issue and give broad authority to condemn for such purpose. Only six states were found that recognize that under the Constitution of the United States some purposes are exclusively federal.[13]

Furthermore, there can be significant practical differences as to which sovereign condemns. There are material differences between the condemnation law of this

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[11]39 U.S.C. 401, reproduced in Appendix H.

[12]n. 10, *supra*

[13]See Appendix K regarding condemnation statutes of selected states.

state and other states, and between the various states and the federal government. Prior to 1937 the Conformative Act, 40 U.S.C. § 258 (superseded by FED. R. CIV. P. Rule 71A) directed that when the federal government exercised its right of eminent domain that the **procedure** of the state practice would prevail. The Conformative Act was repealed and replaced with Federal Rule 71A.

The notes of the Advisory Committee on proposed rules revealed that at one time there were 269 different methods of judicial procedure in different classes of condemnation cases and 56 methods of non-judicial or administrative proceedings. NOTES OF ADVISORY COMMITTEE ON RULES, SUPPLEMENTARY REPORT, 1951 ADDITION, *reprinted in* Federal Civil Judicial Procedure and Rules, at 196 (West Publishing Company, 1993). While the matters referred to related only to procedural matters, substantive differences of law also exist.

The Supreme Court of Texas has held that under Texas law, when a condemnation is contested, the title to the property does not pass until the controversy has been finally resolved. *City of Paris v. Tucker*, 104 S.W. 1046 (1907).[14] Under federal condemnation law, title passes immediately upon the filing of a "declaration of taking", 40 U.S.C. § 258(a).

When the federal government seeks to take its title through an unauthorized assumption of power under state law it assumes a risk not extant under federal law. No case could more graphically demonstrate this point than the instant cause. The federal government has a $3,000,000 building on land to which it has no clear title. Such could not occur had

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[14]This attribute of Texas law is noted in the opinion of Judge Justice located in Appendix I at 33a.

the condemnation been under federal law, which may well explain why Congress did not see fit to delegate concurrent power to the state for condemnation of postal facilities. The postal department may, of course, condemn the premises and the improvements thereon at any time.

From the foregoing, it is apparent that to let the decision below stand, holds an immense potential for risk. This is true because (1) of the size of the property needs of USPS, and (2) only some six states in any way recognize the possible parameters for a state condemning for the federal government.

The potential of the mischief, however, is not restricted to USPS, nor necessarily to matters of eminent domain.

B. Impact not limited to Postal Matters

A number of the powers which were delegated to the federal government are set forth in U.S. CONST. art. I, § 8. They include clause 1, the power to borrow money on the credit of the United States; clause 4, the power to coin money; clause 7 (with which we are concerned) "to establish postoffices and post roads"; clause 8, the authority to issue copyrights; clause 10, the authority to punish piracy and felonies on the high seas, etc. The provisions of section 8 are in pari materia. They are facially properly exercisable exclusively by the federal government, and the courts, only with narrow exceptions, have so held.

Both the history surrounding the formation of our Constitution and the inherent nature of the subject matter ceded to the central government under U.S. CONST. art. I, § 8 make it clear that for the most part the matters there

addressed are concerns of the central government alone. Certainly this is so of the postal functions.

In defining the law constituting the supreme law of the land one must, of course, look not to state law, but to federal law. Were each of the fifty states able to determine, directly or indirectly, the areas wherein supremacy existed, the supreme law of the land would itself be illusory. *Martin v. Hunters Lessee*, 1 Wheat, 304 4 L.Ed. 97 (1816). The authorities above cited establish that the "dual sphere" concept of our federal system has become a part of the supreme law of the land, as has the proposition that the postal function belongs exclusively to the federal sphere. It would appear that the decision in the instant cause departs significantly from the usual and accepted course of judicial proceedings.

CONCLUSION

For the foregoing reasons, writ of certiorari should be granted.

Respectfully submitted,

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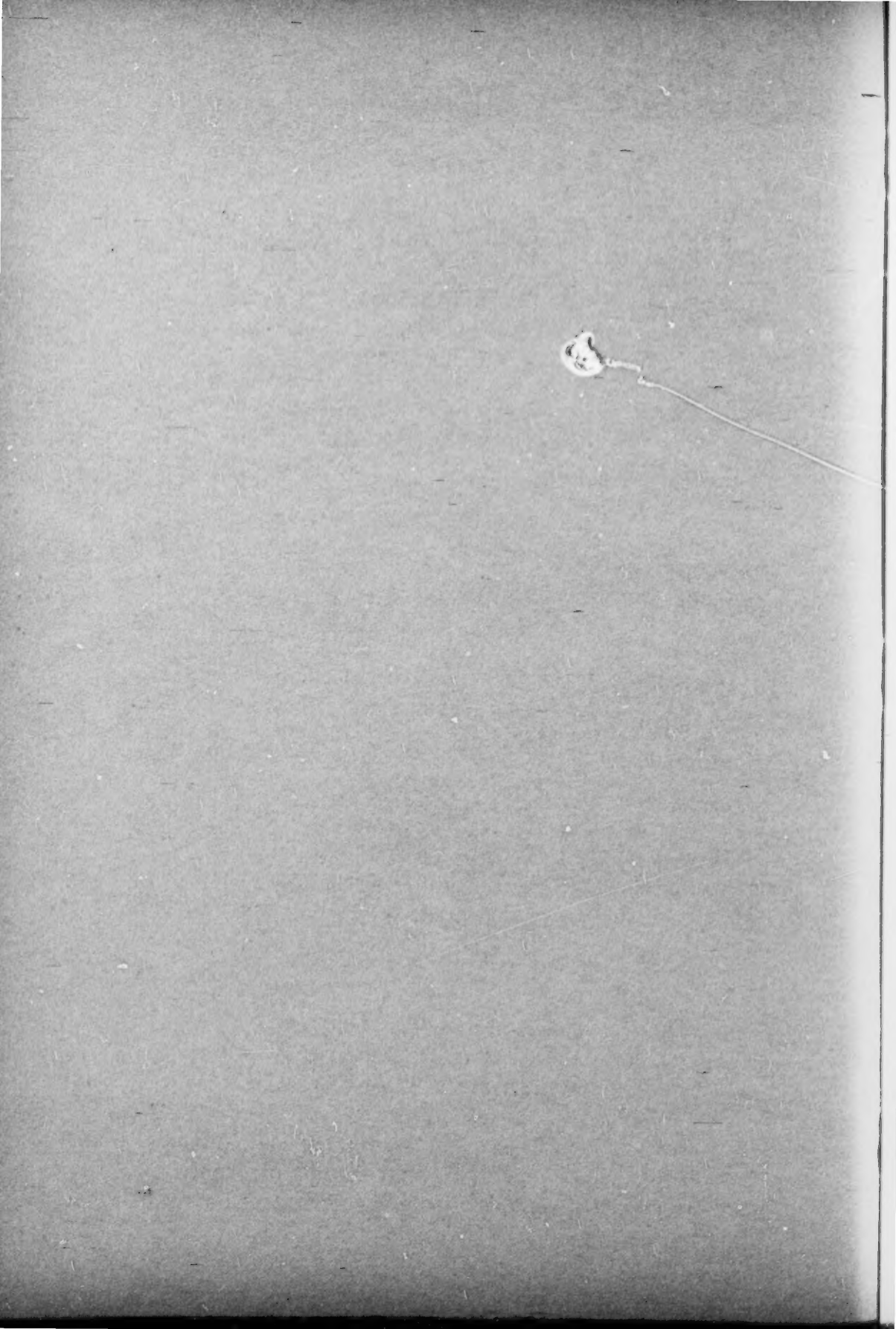

APPENDIX A

The TEXAS FRUIT PALACE, INC., Appellant,

v.

The CITY OF PALESTINE, Appellee.

No. 12-90-00248-CV

Court of Appeals of Texas, Tyler.

Aug. 31, 1992.

Rehearing Denied Jan. 6, 1993.

Lessee brought suit against city challenging constitutionality of condemnation of its leasehold on grounds that property was not applied to public use. The 3rd Judicial District Court, Anderson County, upheld the condemnation and lessee appealed. The Court of Appeals, Bill Bass, J., held that: (1) condemnation so that property could be used for post office was public use; (2) evidence of city's alleged bad faith was properly excluded; and (3) lessee waived alleged error in failure to strike testimony of city's valuation expert.

Affirmed.

1. Eminent Domain 4

State and Federal Constitutions did not confine state's power to condemn property for federal purposes only to those purposes common to both federal and state government

or authorized by congressional enactment. Vernon's Ann.Texas Const. Art 1, § 17.

2. Eminent Domain 67

In reviewing challenge to state's right of eminent domain, court should defer to legislature's declaration of public purpose, unless the purpose is clearly private in nature, rather than inquire whether purpose is state or federal.

3. Eminent Domain 13

Validity of city's exercise of its condemnation power turns on what is considered public use by the legislature; presumption is that a use is public when legislature declares that particular use is public. Vernon's Ann.Texas Const. Art. 1, § 17.

4. Eminent Domain 18

Under statute providing that municipality could acquire land for use of United States government, land used by federal government was "public use" under state's right to eminent domain; consequently condemnation of leasehold interest to establish post office was valid exercise of city's power of eminent domain. Vernon's Ann.Texas Const. Art. 1, § 17; V.T.C.A., Local Government Code § 280.001.

See publication Words and Phrases for other judicial constructions and definitions.

5. Eminent Domain 202(1)

Trial court properly excluded proposed testimony of lessee's valuation expert, in condemnation proceedings, where lessee made no showing what evidence adduced from valuation witness could support its allegations of bad faith, and expert used an inappropriate valuation method.

6. Eminent Domain 196

Testimony concerning indemnity agreement between city and title company was not relevant to lessee's allegation of bad-faith condemnation by city.

7. Eminent Domain 196

Testimony of certified public accountant regarding financial condition of city at time it condemned leasehold was irrelevant to lessee's bad-faith claim, where city had deposited funds in registry of district court long before condemnation case was tried.

8. Eminent Domain 202(1)

Testimony of lessee's real estate appraiser as to value of condemned leasehold was properly excluded based on appraiser's own testimony that valuation method used was improper and not one used by other appraisers.

9. Eminent Domain 147

In condemnation proceedings, measure of value of leasehold estate is value of use and occupancy of leasehold for remainder of tenant's term less agreed rent according to the usual willing buyer, willing seller rule.

10. Eminent Domain 202(1)

In condemnation proceedings, testimony of witness as to value of condemned property, using unauthorized and improper valuation method, should be excluded.

11. Eminent Domain 255

Holder of condemned leasehold waived alleged error in trial court's failure to strike testimony of city's valuation expert witness by failing to move to strike testimony until after city's case in chief.

Billy H. Gragg, Palestine, Brooks Hardee, Tyler, for appellant.

George Staples, Jr., Hurst, Charles W. Nichols, Palestine, for appellee.

BILL BASS, Justice.

This is a case involving a city's condemnation of property for the use of the federal government. The Texas Fruit Palace was awarded $160,000 for its property interest after the City of Palestine (hereinafter "the City") initiated condemnation proceedings in order to transfer the property to the United States Postal Service. The Texas Fruit Palace challenges the constitutionality of the condemnation on grounds that the property was not applied to "public" use. We will affirm the trial court's judgment.

The Texas Fruit Palace is a non-profit corporation that operates the Anderson County Fair (hereinafter Texas Fruit Palace will be referred to as "the Fair"). In 1947, the

Fair leased 13.034 acres from the City for the purpose of holding fairs, circuses, or other performances. The lease agreement provided that the Fair, for a term of fifty (50) years, pay rent of one dollar per year, plus divide with the City any rents and revenues from circuses or other performances. Later, the lease period was extended ten years so that the lease would end in the year 2007.

In 1987, the City adopted a resolution authorizing the City Attorney to initiate condemnation proceedings to condemn the Fair's leasehold interest in the 13.034 acres. The purpose of the condemnation, according to the resolution, was "for the use of the United States Government, to-wit: a post office." Three months later, the City adopted another resolution, declaring that the condemned property was also to be used for city offices, other city buildings, parking facilities, and streets and alleys. The City thereafter commenced condemnation proceedings in the District Court of Anderson County, where the court entered judgment based on a court-appointed commissioner's determination that the value of the leasehold estate was $160,000. Subsequently, the City executed a deed, conveying 7.0353 acres out of the 13.034 acres to the United States Postal Service.

The Fair brings four points of error on appeal. In its first point of error, the Fair challenges the validity of the condemnation. In points of error two, three, and four, the Fair argues that, in the event we hold the condemnation valid, the trial court committed reversible error in the admission and exclusion of certain evidence.

In its first point of error, the Fair argues that the condemnation of its leasehold interest for use by the United States Postal Services was void because the City's power of eminent domain was not exercised for "public purposes."

The Fair insists that the State of Texas and its subdivisions, as a sovereign in our federal system, may exercise only its power of eminent domain to condemn property for a legitimate public purpose of the state. The postal service being an exclusively federal function, the Fair argues, a condemnation by a state for a post office would be an invalid exercise of that power. The Fair cites the United States Supreme Court case of *Kohl v. United States*, 91 U.S. 367, 23 L.Ed. 449 (1876), in support of its position.

In *Kohl*, the Court announced that the right of eminent domain was a "right belonging to a sovereign created to take property for its own public use, not for those of another." *Kohl*, 91 U.S. at 373, 23 L.Ed. 449 (adopting the Michigan Supreme Court's view in *Trombley v. Humphrey*, 23 Mich. 471 (1871)). The issue confronting the Court in *Kohl* was not a state's right to condemn land for federal purposes, but the federal government's right of eminent domain for its own use without the consent of the state. Though the language in *Kohl* was dicta, the principle has nevertheless been applied to limit a state's power to condemn property for use of the federal government. *See Darlington v. United States*, 82 Pa. 382 (1877) (condemnation by state for U.S. government buildings held unconstitutional). However, the authorities cited by the Fair are not conclusive in supporting an absolute restriction on states' power to condemn land for an exclusively federal use by the U.S. government. States have been permitted to condemn property for some federal purposes, even when the purpose is a traditionally exclusive federal function. *See Rockaway Pacific Corp. v. Stotesbury*, 255 F. 345 (2d Cir. 1917) (state allowed to condemn for defense purposes); *Fishel v. Denver*, 106 Colo. 576, 108 P.2d 236 (1940) (condemnation by city for U.S. air corps technical school upheld); *Branch v. Lewerenz*, 75 Conn. 319, 53 A. 658 (1902) (state's right to condemn for the benefit of the U.S.

Navy); *Burt v. Merchants' Ins. Co.* 106 Mass. 356 (1871) (state allowed to condemn for a post office and treasury building).

[1.2] The Fair insists that the law with regard to the power of a state to condemn land for use of the federal government is fully developed and unambiguous. It argues that a state's right of eminent domain does not extend to condemnation for an exclusively federal purpose, but a state may condemn land for the federal government when the use is common to both governments or authorized by congressional enactment. There is no shortage of decisions which turn upon the question of what federal purposes are exclusive. However, we do not agree that the United States or Texas Constitutions can be interpreted to limit the state's power to condemn property for federal purposes to only those purposes deemed by the courts to be "non-exclusive." In fact, the majority rule appears to be that the exercise of the power of eminent domain by a state or under the authority of a state, if otherwise valid, is not invalidated by the fact that the power is exercised for the benefit or use of the United States. 143 A.L.R. 1040, 1042. In light of more recent opinions articulating the role of legislatures and the judiciary in determining whether the power of eminent domain is being exercised for public purposes, we believe the proper view is to defer to the legislature's declaration of a public purpose, unless the purpose is clearly private in nature. *Housing Authority v. Higginbotham*, 135 Tex. 158, 143 S.W.2d 79,83 (1940); *West v. Whitehead*, 238 S.W. 976, 978 (Tex.Civ.App. —San Antonio 1922, writ ref'd); *see Berman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954).

[3] The Texas Constitution states that "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being

made, unless by the consent of such person ...." TEX. CONST. art. 1, § 17. The validity of the City's exercise of its condemnation power turns on what is considered a public use by the legislature. The presumption is that a use is public when the legislature declares that a particular use is public. *West v. Whitehead*, 238 S.W. 976, 978 (Tex.Civ.App.—San Antonio 1922, writ ref'd). In *Imperial Irrigation Co. v. Jayne*, the Texas Supreme Court stated:

> The power of eminent domain has been delegated by the people to the legislative department of the government in the general grant of legislative power. Whether the power of eminent domain shall be put in motion for any particular purpose, and whether the exigencies of the occasion and the public welfare require or justify its exercise, are questions which rest entirely with the Legislature.

Imperial Irrigation Co. v. Jayne, 104 Tex. 395, 138 S.W. 575, 587 (1911). Similarly, the United States Supreme Court in *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), explained that "[t]he role of the judiciary in determining whether that power [of eminent domain] is being exercised for a public purpose is an extremely narrow one." *Id.* at 32, 75 S.Ct. at 102.

[4] Section 280.001 of the TEXAS LOCAL GOVERNMENT CODE provides, in part, that "[a] municipality or county, separately or jointly, may acquire land for the use of the United States government, either by a lease for a term of years or in fee simple title." By enacting this provision, we believe the Texas Legislature had declared that land used by the United States government is a "public use" under its right to eminent domain. The

legislature's enactment of Section 280.001 was not violative of any state or federal constitutional limitations on the power of eminent domain. Consequently, we conclude that the condemnation of the Fair's leasehold interest was a valid exercise of the City of Palestine's power of eminent domain under the Texas Constitution and Section 280.001 of the Texas Local Government Code. Point of error one is overruled.

[5] In its second point of error, the Fair argues that the trial court erred when it excluded evidence supporting its allegations that the City acted in bad faith when it condemned the Fair's leasehold interest. In its brief, the Fair cites three instances where the court excluded evidence supporting the allegations of bad faith on the part of the City. The first is testimony of the Fair's valuation expert, Raymond Woodard. The Fair does not explain what evidence adduced from the valuation witness could support its allegations of bad faith, and neither is it clear from the record. Furthermore, the court excluded Mr. Woodard's testimony because of the inappropriate valuation method employed. The trial court did not err in excluding Mr. Woodard's testimony.

[6] The second instance of evidence that the Fair contends was erroneously excluded was the deposition testimony of Jack Shelden. The court sustained the City's relevancy objection, excluding Mr. Shelden's testimony concerning an indemnity agreement that the City entered into with a title company. The Fair argues that this fact was relevant to its allegation of bad faith because the City improperly assumed liability in the event that the ongoing litigation between the City and the Fair rendered the title to the property unmarketable. The Fair fails to explain how

this would constitute a bad faith condemnation of the its property, especially since the Fair was not adversely affected by the indemnity agreement.

[7] The Fair cites a third instance of excluded evidence in support of its bad faith allegation. The court excluded the testimony of Jesse George, Jr., a certified public account, who was to testify regarding the financial condition of the City at the time of the condemnation. The court excluded the evidence on relevancy grounds. The Fair's argument is that the funds used by the City for condemnation of the property must be available at the time of the condemnation; failure to do so constitutes bad faith. The City insists that this requirement was met since it deposited $160,000 in the registry of the district court long before the case was tried. The court took judicial notice of this fact and sustained the City's objection. We believe the court properly excluded Mr. George's testimony. The Fair fails to ~~cite applicable author~~ity that the City's conduct constitutes bad faith. Point of error two is overruled.

[8] In its third point of error, the Fair argues that the trial court erred in excluding certain testimony of the Fair's real estate appraiser, Raymond Woodard. The court made its ruling after hearing the live testimony of Mr. Woodard, Mr. Woodard's previous deposition testimony, and argument of both parties. The court concluded, based upon the appraiser's own testimony, that the valuation method used was improper and was not one used by other appraisers, or one that Mr. Woodard had ever used before. Mr. Woodard was asked, "Do you have anything anywhere in any of your appraisal manuals that suggests that that's an appropriate way to arrive at value?" Mr. Woodard answered, "Not that I know of. I don't know that it is or is not. To me it's reasonable, because we're bringing the people current, whole."

The Fair's appraiser admitted that when he examined the leased property to determine the highest and best use, he only considered the property's use as a fair-ground, and not for either residential or commercial use. He also testified that the value of the Fair's leasehold interest was greater than the value of the land and improvements. Furthermore, he valued the property interest as it related to what it would cost the Fair to purchase substitute land and buildings.

[9,10] The court concluded that since the appraiser himself admitted that this theory of appraisal was unique and not standard practice, any testimony of value calculated by this method should be excluded. The measure of value of a leasehold estate is the value of the use and occupancy of the leasehold for the remainder of the tenant's term, less the agreed rent; the values are determined by the usual willing buyer, willing seller rule. *Luby v. City of Dallas*, 396 S.W.2d 192, 198 (Tex.Civ.App.—Dallas 1965, writ ref'd n.r.e.). The testimony of a witness who uses an unauthorized and improper valuation method should be excluded. *City of Corsicana v. Herod*, 768 S.W.2d 805, 813 (Tex.App.—Waco 1989, no writ). Since the trial court has substantial discretion in determining the admissibility of evidence of market value in a condemnation case, we conclude that the trial court did not err in excluding the evidence. *State v. Angerman*, 664 S.W.2d 794, 796 (Tex.App.—Waco 1984, writ ref'd n.r.e.). Point of error three is overruled.

[11] In its fourth and final point of error, the Fair insists that the court erred in overruling its motion to strike the testimony of the City's valuation expert witness, James Norwood. The Fair failed to object to any of Mr. Norwood's testimony, and only moved to strike the testimony after the Fair had re-called Mr. Norwood during its own case-in-chief. The City had already rested its case,

the Fair had put on its evidence, and the court had excluded the Fair's expert when the motion to strike was made. A motion to strike must ordinarily be made at the time the testimony is given, if the fact that it is objectionable is then apparent. *Collins v. Smith*, 142 Tex. 36, 175 S.W.2d 407, 408-09 (1943). The Fair gives no explanation as to why it failed to object to Mr. Norwood's testimony, or why it failed to move to strike until after the City's case-in-chief. We conclude that the Fair's failure to object and timely move to strike Mr. Norwood's testimony waived any error on appeal. The Fair's fourth point of error is overruled.

The trial court's judgment is affirmed.

APPENDIX B

TOM B. RAMEY, JR.
CHIEF JUSTICE

BILL BASS
JUSTICE

CHARLES HOLCOMB
JUSTICE

CAROLYN ALLEN
CLERK

MARY C. STRAND
CHIEF STAFF ATTORNEY

TELEPHONE
(903)593-8471
TEX-AN 831-5234

COURT OF APPEALS
Twelfth Court of Appeals District

1517 WEST FRONT STREET
SUITE 354
TYLER, TEXAS 75702

January 6, 1993

Hon. Billy H. Gragg
P.O. Box 678
Palestine, TX 75801

Hon. Brooks Hardee
Route 8, Hardee Building
Tyler, TX 75703

Hon. George A. Staples, Jr.
Staples, Foster & Hampton
701 Texas Commerce Bank Building
860 Airport Freeway West
Hurst, TX 76054

Hon. Charles W. Nichols
P.O. Box 1687
Palestine, TX 75801

RE: Case No. 12-90-00248-CV
Trial Court No. 32681

Style: Texas Fruit Palace, Inc.
v. Palestine, City of

Dear Counsel:

You are hereby notified that in the above-described cause, the following decision and order was this day made and entered by this court:

"Appellant's Motion for Rehearing having been duly considered, it is ORDERED that said motion be, and hereby is, **overruled**."

Respectfully yours,

/s/ Carolyn Allen
CAROLYN ALLEN, CLERK

APPENDIX C

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

April 21, 1993

Billy H. Gragg
P. O. Box 678
Palestine, TX 75801

Mr. Richard Hardee
Hardee & Hindman
Rt#8, Hardee Building
Highway 155 South
Tyler, TX 75703

Mr. George A. Staples, Jr.
Staples, Foster & Hampton
701 Texas Commerce Building
860 Airport Freeway West
Hurst, TX 76054

Mr. Charles W. Nichols
P. O. Box 1687
Palestine, TX 75801

RE: Case No. D-3369

Style: THE TEXAS FRUIT PALACE V. CITY OF PALESTINE

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Sincerely,

JOHN T. ADAMS, Clerk

by /s/ illegible
Courtland Crocker, Deputy

APPENDIX D

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

May 19, 1993

Billy H. Gragg
P. O. Box 678
Palestine, TX 75802

Mr. Richard Hardee
Hardee & Hindman
Rt#8, Hardee Building
Highway 155 South
Tyler, TX 75705

Mr. George A. Staples, Jr.
Staples, Foster & Hampton
701 Texas Commerce Building
860 Airport Freeway West
Hurst, TX 76054

Mr. Charles W. Nichols
P. O. Box 1687
Palestine, TX 75801

RE: Case No. F-3369

Style: THE TEXAS FRUIT PALACE v. CITY OF PALESTINE

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ illegible
Courtland Crocker
Deputy

APPENDIX E

ACQUISITION FOR FEDERAL USE

Cross References

Conveyance of county land to United States for military purposes, see art. 5248c—1.

Art. 5248e. Cities or counties, acting separately or jointly, may acquire lands for use of United States Government; contracts; validation of agreements

Authority to acquire

Section 1. Any city or county in the State, separately or jointly, is authorized to acquire lands for the use of the United States Government, either by a lease for a term of years or in fee simple title; said lands shall lie within the limits of the county acquiring same, or if acquired by a city, within the limits of the county in which said city is located.

Appropriations; warrants

Sec. 2. For the purpose of acquiring lease-hold interest or fee simple title to lands for the use of the United States Government, authorized above, the said city or county is authorized to appropriate any available funds and also to issue time warrants in payment thereof; provided, however, that in the event time warrants are proposed to be issued, the provisions of Article 2368-a of the Revised Civil Statutes of the State of Texas shall be followed in the issuance of said time warrants.

Condemnation

Sec. 3. For the purpose of acquiring lease-hold or fee simple estate in lands for the use of the United States Government, any city or county may condemn lands for such purpose, and said condemnation may be for any period of years or in fee simple title, and in the acquisition of said interest desired, said city or county may, immediately after filing condemnation suit, as now provided by law, take possession of said lands by depositing with the County Clerk the amount of money estimated by the Commissioners' Court or City Council of the city or county involved, to be the just compensation for the interest in the land taken. Said petition for condemnation shall set forth the amount of said money so found by the Commissioners' Court or City Council, to be just, and such finding shall be made by said body prior to the filing of the petition of condemnation. In the event the Special Commissioners appointed under the condemnation statutes, after a hearing as provided by law, find the just compensation to be greater than the amount fixed by the Commissioners' Court or City Council, then an additional amount shall be deposited with the County Clerk by the taking authority, so as to equal the amount found by the Commissioners. Condemnation may be in the name of the city or county and said city or county may at any time after the taking, which shall be from the date the deposit of the money estimated by the Commissioners' Court or City Council, or the date of deposit of the amount fixed by the Special Commissioners in the event the taking is not desired until after the Commissioners have acted thereon, transfer the interest acquired by the taking to the United States Government.

Contracts

Sec. 4. Any city or county may contract with the United States Government or its agencies obligating itself to acquire a lease-hold interest, or fee simple title in land as above authorized and any agreement heretofore executed by any city or county with the United States Government binding itself to acquire interest in land for the Government is hereby validated.

Partial unconstitutionality

Sec. 5. If any section, sub-section, sentence, clause or phrase of this Act shall be held unconstitutional for any reason, such fact shall not affect the remaining portions hereof. Acts. 1941, 47 Leg., p. 239, ch. 168.

Historical Note

Title of Act:

An Act authorizing any city or county of the State, acting separately or jointly, to acquire lands for the use of the United States Government, either by lease for a term of years or in fee simple title; authorizing the appropriation of any available funds of any such city or county for the payment of such lands; authorizing the issuance of time warrants in payment thereof; authorizing the condemnation of lands for such purpose, either for a period of years or in fee simple; authorizing the taking of possession of said lands, immediately after filing condemnation suit, upon depositing with the County Clerk the amount of money estimated by the Commissioners' Court or City Council of the city or county involved to be just compensation for the interest taken; providing for the deposit of any additional amount found by the Special Commissioners in condemnation where the

compensation found to be just is greater than the amount fixed by the Commissioners' Court; authorizing any such city or county to contract with the United States Government or its agencies, obligating itself to acquire lease-hold interest or fee simple title in land, and validating amy such agreement heretofore executed by any such city or county with the United States Government; providing that unconstitutionality of any part of the law shall not invalidate the remainder; and declaring an emergency. Acts 1941, 47th Leg., p. 239, ch. 168.

APPENDIX F

TEX. LOCAL GOV'T CODE (Vernon)

CHAPTER 280. MISCELLANEOUS PROVISIONS AFFECTING ACQUISITION, SALE, OR LEASE OF PROPERTY BY MUNICIPALITIES AND COUNTIES

Section
280.001. Land for Use of United States.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

§ 280.001. Land for Use of United States

(a) A municipality or county, separately or jointly, may acquire land for the use of the United States government, either by a lease for a term of years or in fee simple title.

* * * *

(h) A municipality or county may contract with the United States government obligating itself to acquire a lease-hold interest or fee simple title in land as authorized by this section.

Acts 1987, 70th Leg. ch. 149, § 1, eff. Sept 1, 1987.

Section 262.021 et seq.[1]

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1. This article omits section 5 of 5238(e) relating to severability. The severability is still provided for however, in sections 311.032 & 312.013 TEX GOV'T CODE.

APPENDIX G

ART. I, § 8 CONSTITUTION OF UNITED STATES

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal. and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

APPENDIX H

39 USCS § 401

The postal service shall have the following general powers:

* * * * *

(5) To acquire, in any lawful manner, such personal or real property, or interest therein, as it deems necessary or convenient in the transaction of its business; to hold, maintain, sell, lease, or otherwise dispose of such property or interest therein; and to provide services in connection therewith and charges therefore;

* * * * *

(9) To exercise, in the name of the United States the right of eminent domain for the furtherance of its official purposes; and to have the priority of the United States with respect to the payment of debts out of the bankrupt, insolvent, and decedents' estates; and

(10) To have all other powers incidental, necessary, or appropriate to the carrying out of its functions or the exercise of its specific powers.

APPENDIX I

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
JUN 15 1987
MURRAY L. HARRIS, CLERK
BY DEPUTY GLORIA BEELER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TEXAS FRUIT PALACE, INC., Plaintiff,	)	
v.	)	CIVIL ACTION NO.
	)	TY-87-185-CA
CITY OF PALESTINE, TEXAS, Defendant.	)	

ORDER

Plaintiff Texas Fruit Palace, Inc. (TFP), filed the above-entitled and numbered civil action on May 22, 1987, demanding a temporary restraining order and a preliminary and permanent injunction. The demand for a temporary restraining order was denied at an in-chambers conference held the afternoon that the civil action was instituted. On June 3, 1987, a hearing was conducted relevant to the propriety of granting a preliminary injunction. As more fully set forth below, TFP possesses an adequate remedy at law, making preliminary or permanent injunctive relief inappropriate. Furthermore, because TFP has requested only equitable relief in this lawsuit, and all such relief has been denied, this civil action must be dismissed.

At issue in the present dispute is the authority of defendant City of Palestine (City) to utilize its power of eminent domain against a leasehold interest owned by TFP. The City owns fee simple title to the land in question. Since 1952, pursuant to a fifty-year lease, TFP used the land to provide a location for an annual county fair. The City and TFP have disputed the amount of rent owing under the lease since 1978. The City filed suit in the District Court of Anderson County, Third Judicial District of Texas, where summary judgment was granted in favor of the City's interpretation of the lease. However, the Court of Appeals for the Twelfth Supreme Judicial District of Texas reversed and remanded the cause for trial.[1] Pending trial in state district court, TFP came to believe that the City intended to sell the land in question to the United States Postal Service for construction of a post office.[2] TFP filed this action seeking to enjoin any condemnation activity by the City against TFP's leasehold in furtherance of the contemplated sale of land.[3]

TFP's main contention is that the City lacks authority to procure land for a post office, because the federal government possesses exclusive authority in postal matters. Several nineteenth century decisions are offered as support

---

1. *Texas Fruit Palace, Inc. v. City of Palestine*, No. 32,681 (Tex.App. - Tyler, April 25, 1986, writ ref. n.r.e.) (unpublished decision).

2. The parties have apparently agreed to delay their state court trial as a result of the potential sale.

3. The City asserts that no condemnation will occur until a buyer (e.g., the United States Postal Service) is contracted to purchase the land. However, TFP has introduced evidence demonstrating that the threat of such condemnation is sufficiently crystalized so as to make the dispute ripe for adjudication.

for this position. In *Trombley v. Humphrey*, 43 Mich. 471 (1871), the Michigan Supreme Court held that the state of Michigan lacked the authority to condemn land for the express and exclusive purpose of transferring such property to the federal government for the construction of lighthouses. The foundation for the holding in *Trombley* is the doctrine that a state's sovereign power of eminent domain may not be utilized for the sole purpose of benefitting another sovereign entity, whether the other sovereignty be a state, the federal government, or a foreign nation. *Id.* at 475-476. The analysis in *Trombley* was adopted by the United States Supreme Court, as dictum, in *Kohl v. United States*, 91 U.S. 367, 373-74 (1875): "The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity; which alone is the foundation of the right." *See also Darlington v. United States*, 82 Pa. 382 (1877) (adopting the analysis in *Trombley*).

Whatever the merits of TFP's constitutional argument, the posture of the present dispute necessitates denial of TFP's demand for injunctive relief. As a preliminary matter, the City asserts that the Anti-Injunction Act, 28 U.S.C. §2283, prohibits federal intervention in the state litigation at issue here. However, there is not currently a condemnation proceeding involving these parties. The demand that such proceedings be enjoined in the future does not run afoul of the Act, which prohibits interruption of extant, as opposed to threatened, state court proceedings. *See Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1964); 17 C.Wright, A.Miller & E.Cooper, Federal Practice and Procedure §4222 at 318 (1978). Moreover, an exception to the Anti-Injunction Act exists for actions brought under 42 U.S.C. § 1983. *See Mitchum v. Foster*, 407 U.S. 225 (1972); *Joiner v. City of Dallas*, 488 F.2d 519 (5th Cir. 1974). Because

TFP's claim is directed toward alleged unconstitutional activity of the City, and could presumably be brought under 42 U.S.C. §1983, the Anti-Injunction Act does not apply.

Nevertheless, injunctive relief shall not issue. A federal court, sitting in equity, may in its discretion grant preliminary or permanent injunctive relief only where there is a risk of irreparable harm, and there exists no adequate remedy at law. *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974). In this case, TFP may recover damages, if the City is eventually found to have condemned TFP's property rights in an unconstitutional or unauthorized manner. *See Matador Pipelines, Inc. v. Watson*, 626 S.W.2d 139, 141 (Tex. App. -- Waco 1981, writ ref'd n.r.e.) (affirming award of actual and punitive damages for legally invalid condemnation). TFP's ability to obtain damages constitutes an adequate remedy at law, and undercuts the assertion of irreparable injury. *See Morgan v. Fletcher*, 518 F.2d 236, 239-40 (5th Cir. 1975) (reversing grant of preliminary injunction).

TFP asserts that it lacks an adequate remedy at law, because of the haste with which the threatened condemnation could take place. *See* plaintiff's brief, May 27, 1987, at 4-7; plaintiff's supplemental brief, June 10, 1987, at 5-8. It is true that, upon depositing the amount of money awarded by the condemnation commissioners, the condemnor is entitled to "take possession" of the property. Tex.Prop.Code §21.021(a)(1) (Vernon 1974).[4] However, it appears that full

---

4. It is not entirely clear whether the threatened condemnation would proceed under the general eminent domain procedures set out in Tex.Prop.Code Ann. §21.001 *et seq.* (Vernon 1973), or under Tex.Rev.Civ.Stat.Ann. art. 5248e (Vernon 1962), which seems especially suited for municipalities seeking to condemn property for eventual transfer to the United States government. Under either statutory scheme, however, it is evident that TFP has ample opportunity to raise its constitutional arguments and seek damages.

title to the property does not vest with condemnor until a final court judgment has been entered and the appellate process had been exhausted. *Id.* Under Texas law, the condemnee may contest in state district court both the authority of the condemning entity, and whether or not the condemnation is in furtherance of a valid public purpose. *See Housing Authority of City of Dallas v. Higginbotham*, 143 S.W.2d 79 (Tex. 1940); *Tenngasco Gas Gathering Company v. Fischer*, 653 S.W.2d 469 (Tex.App. -- Fort Worth 1985, writ ref's n.r.e.). TFP's constitutional arguments may be raised prior to the passing of title, or on appeal, thereby preserving the adequacy of TFP's remedy at law. *See Travis v. Pennyrile Rural Electric Cooperative*, 399 F.2d 726, 729 (6th Cir. 1968) (denying request for injunction against state condemnation proceeding). *See also Ahrensfeld v. Stephens*, 528 F.2d 193 (7th Cir. 1975) (federal constitutional objections to state court eminent domain proceedings could be raised in state court, thereby rendering injunctive relief inappropriate). Accordingly, it is

ORDERED that plaintiff's motion for preliminary and permanent injunction shall be, and it is hereby, DENIED. It is further

ORDERED that the above-entitled and numbered civil action shall be, and it is hereby, DISMISSED.

SIGNED and ENTERED this 15th day of June, 1987.

/s/ Wm. Wayne Justice
Chief Judge

APPENDIX J

4-18-87

APR 13 1989
BY DEPUTY /s/ Louise Hewitt

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

THE CITY OF PALESTINE, TEXAS	§	
Vs.	§	
THE TEXAS FRUIT PALACE, INC.	§	TY-88-106-CA
Vs.	§	
THE UNITED STATES POSTAL SERVICE	§	

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

THE CITY OF PALESTINE	§	
Vs.	§	
THE TEXAS FRUIT PALACE INC.	§	TY-88-
Vs.	§	106-CA
THE UNITED STATE POSTAL SERVICE and UNITED STATES OF AMERICA	§	

ORDER

The Court hereby issues the following to reflect the Court's oral order of April 11, 1989, in the above-styled and numbered action.

The Court hereby withdraws the above-styled and numbered action from the jury. The action between the Texas Fruit Palace, Incorporated ("TFP") and the United States Postal Service ("USPS") and United States of America ("USA") is severed from the above-styled and numbered action, pending a disposition in the state district court of Anderson County, Texas, of the action between the City of Palestine, Texas ("City"), and the TFP involving, among other state law issues, the issue of eminent domain. The Court finds that it lacks jurisdiction over the severed action between the City and the TFP and, therefore, remands that action pursuant to 28 U.S.C. §1447(c). All issues between the TFP and the USPS and USA are issues to be decided by this Court and this Court will reserve its ruling on these issues pending the resolution of the issues between the City and the TFP. It is, therefore,

ORDERED that the action between the City and the TFP be and hereby is SEVERED from the action between the TFP and the USPS and USA. It is further

ORDERED that the action between the City of Palestine, Texas, and the Texas Fruit Palace be and hereby is REMANDED to the Third District Court of Anderson County, Texas. A certified copy of this order shall be mailed by the Clerk of this Court to the Clerk of the State Court. The State Court may thereupon proceed with such case.

SIGNED this 13th day of April, 1989.

/s/ William M. Steger
UNITED STATES DISTRICT JUDGE

APPENDIX K

A rather general review of the condemnation statutes of the fifty states suggests that they may be categorized loosely into four categories, as follows:

CATEGORY I

A Texas type statute where broad authority is granted to condemn property for the United States, with no distinction between the public use of one sovereign or the other.

There are four states in this category:

(1) Alaska	ALASKA STAT. § 09.55.240(1) (Michie 1992)
(2) West ann. Cal. Gov. Code (1983)	WEST ANN. CAL. GOV. CODE § 50360 (1983)
(3) Montana	MONT. CODE ANN. § 70-30-102(1) (1979)
(4) Nevada	NEV. REV. STAT. ANN. § 37.010 (Michie 1991 Supp.)

The California Civil Statute provides in pertinent part:

> "The legislative body of a local agency may convey land which it owns within it boundaries to the United States to be used for federal purposes

> and may acquire land for this purpose pursuant to this article."

While the Alaska Civil Statute provides in pertinent part:

> **"Sec. 09.55.240. Uses for which authorized; rights-of-way.** (a) The right of eminent domain may be exercised for the following public uses:
>
> (1) all public uses authorized by the government of the United States; . . .

CATEGORY II

These states appear to think it appropriate to grant authority to the federal government to condemn for federal purposes, although, of course, no such grant is necessary if the federal condemnation is for a purpose exclusively federal (see Kohl vi), or if there has been federal preemption.

These states are:

(1)	Connecticut	CONN. GEN. STAT. ANN. § 48-1 (a) (WEST 1958)
(2)	Florida	FLA. STAT. ANN. § 6.02 (WEST 1998)
(3)	Kansas	KAN. STAT. ANN. § 27-101 (1986)

(4)	Maine	ME. REV. STAT. ANN. I § 15-A & 17-A (WEST 1964)
(5)	New York	GENERAL MUNICIPAL LAWS OF N.Y. § 210 (West 1986)
(6)	South Carolina	CODE OF LAWS OF S.C. ANN. § 3-1-110 (WEST 1986)

The Connecticut act provides in pertinent part:

> The consent of the state of Connecticut is given, in accordance with the seventeenth clause, eighth section, of the first article of the constitution of the United States, to the acquisition by the United States, by purchase, condemnation or otherwise, of any land in this state required for customhouses, courthouses, postoffices, arsenals or other public buildings or for any other purposes of the government ...

New York provides in pertinent part:

> The United States is hereby authorized to acquire by condemnation, purchase or give in conformity with the laws of

> this state, one or more pieces of land not exceeding two acres in extent, in any city or village of this state, for the purpose of erecting and maintaining thereon a public building for the accommodation of postoffices and other governmental offices in any such city or village.

Florida provides in pertinent part:

> The United States may purchase, acquire, hold, own, occupy and possess such lands within the limits of this state as they shall seek to occupy and hold as sites on which to erect and maintain forts, magazines, arsenals, dockyards, and other needful buildings or any of them, as contemplated and provided in the constitution of the United States; such land to be acquired whether by contract with owners, or in the manner hereinafter provided.

CATEGORY III

At least one state appears to think it necessary to grant their permission before the United States condemns in their territory.

Ohio provides in pertinent part Pages OHIO REV. CODE ANN. STATE GOV. § 159.01 (1990)

> Whenever it is necessary for the United States to acquire title to a tract of land in this state for any purpose and the state gives its consent to such acquisition; the United States may acquire such land by appropriation; and for such purpose sections 163.01 to 163.22, inclusive, of the Revised Code, are hereby made applicable, and said United States, in appropriating such property, shall in all respects, be governed by the acts referred to in this section, and such other acts supplemental thereto and amendatory thereof as may be in force when such proceedings take place; . . . .

CATEGORY IV

The review of the statutes in the remaining states did not reveal any particularly noteworthy statutory material - i.e. no mention one way or the other - of condemnation for the federal government was made.

Supreme Court, U.S.
FILED
SEP 7 1993
OFFICE OF THE CLERK

(2)

No. 93-228

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

THE TEXAS FRUIT PALACE, INC.,
Petitioner,

v.

THE CITY OF PALESTINE,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Twelfth Supreme Judicial District Of Texas

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

* GEORGE A. STAPLES, JR.
State Bar No. 19058000
860 Airport Freeway, W., #701
Hurst, Texas 76054
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Palestine, Texas 75801
214/729-5104
Attorneys for Respondent
* Counsel of Record

Alpha Law Brief Company • Houston, Texas • (713) 981-9000 • 1-800-981-9001

QUESTIONS PRESENTED

1. Respondent does not agree that the Question Presented by Petitioner is actually presented by the case at bar. Such Question, as formulated by Petitioner, is as follows:

> "Absent Congressional authorization, can a state (or a political subdivision thereof) condemn property in support of a function delegated exclusively to the federal government in the Constitution of the United States - e.g. the postal function."

LIST OF ALL PARTIES

The parties at interest are The Texas Fruit Palace, Inc., (Fruit Palace), Defendant in the trial court; and the City of Palestine, Texas (City), Plaintiff in the trial court.

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106 Mass. 356 (1871) 6, 16

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Schooler v. State,
175 SW2d 664 (Tex.Civ.App.-El Paso 1943,
writ ref'd w.o.m.) 13

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1983, writ ref'd n.r.e.) 14

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Vann v. Cameron County, Texas,
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writ dism'd) 7

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U.S.549, 56 S.Ct.245, 80 L.Ed.388. . . . . .8, 9, 12

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MISCELLANEOUS

1 Nichols, *Eminent Domain* §2.113 (Sackman rev. ed. 1988) 7, 8

1 Nichols, *Eminent Domain* §2.113[3], p.111. 9

21A Nichols, *Eminent Domain* §7.15 (1987). 15

21A Nichols, *Eminent Domain* §7.18-19 (1987) 15

21A Nichols, *Eminent Domain* §7.20 (1987). 16

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Public Law 680. 10

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No. 93-228

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE TEXAS FRUIT PALACE, INC.,
Petitioner,

v.

THE CITY OF PALESTINE,
Respondent.

Petition For Writ Of Certiorari
To The Court Of Appeals for the
Twelth Supreme Judicial District of Texas

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinions of the District Court of Anderson County, Texas, 3rd Judicial District of Texas are unreported. The Order of possession is attached as Appendix A, Page 1a. The opinion of the Court of Appeals is reported at 842 SW2d 319. The Texas Supreme Court has denied Petitioner's Application for Writ of Error.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Constitutional Provisions.

There are no genuine constitutional issues. Petitioner seeks to involve the due process clauses of the fifth and Fourteenth Amendments.

B. Statutes.

The statutory provisions here involved are Sections 211.008 through 211.011, Texas Local Government Code (formerly Article 1011g, Texas Revised Civil Statutes).

STATEMENT OF THE CASE

This is an eminent domain case. Petitioner's description is not accurate, however. The thirteen-acre property which is the subject of this suit is owned by the Respondent, City of Palestine. It leased the property for a nominal sum to Petitioner, Fruit Palace, to operate an annual county fair. The property cannot, under the terms of the lease, be used for any other purpose and terminates if the Fruit Palace fails to hold an annual fair. Prior to expiration of the lease, the City condemned the remaining leasehold for the dual purpose of; (1) utilizing part for City offices, warehouse, maintenance garage and storage yard; and (2) conveying a portion to the United States Postal Service for a regional postal facility. The City took possession after depositing the appraised price into the registry of the Court, conveyed seven acres to USPS and moved its maintenance, storage and warehouse operations onto the six remaining acres. The only buildings on the thirteen- acre site at the time of the condemnation were located on the six acres

retained by the City. The regional postal facility is now constructed and operating on the seven acres acquired for that purpose.

Petitioner claims a lack of authority by Respondent City to condemn because part of the leasehold estate condemned was conveyed, along with the underlying fee, to USPS; and under the U.S. Constitution, only Congress is specifically authorized to establish post offices.

ARGUMENT

This case does not, as urged by Petitioner, present the question of an attempted exercise of an exclusive Federal power by a political subdivision of a state. Rather, as described by the Courts below, this is a case in which the Respondent exercised its powers partly to benefit itself (by acquiring a maintenance facility) and only partly to assist the United States Postal Service (by conveying part of the leasehold estate condemned, plus part of its underlying fee to USPS). On September 25, 1987, the District Court of Anderson County, Texas found that the award had been paid into the registry of the Court and ordered that the City be given immediate possession of the property. (Appendix A, Page 2a) In pertinent part, the Court's Order of September 25, 1987 stated:

> "It is further ORDERED, ADJUDGED and DECREED that the Clerk of this Court shall issue a Writ of Possession in favor of Plaintiff to effect delivery of the immediate possession of said property to TEXAS FRUIT PALACE, INC., and all persons claiming by, through or under them since the filing of this proceeding, and commanding the sheriff or any constable in the State of Texas to remove

> therefrom all persons and their personalty, if any, situated thereon, to the end that Plaintiff, its authorized agents, employees, servants and independent contractors may at once enter upon said property described in Exhibit "A" *for the purpose of conveying a portion of the property to the United States Government for a regional postal facility and for the location of city offices, city warehouse, city equipment barns, city maintenance garages, city storage yards, city indoor storage buildings, parking facilities, and streets and alleys*, as described in its written Statement and Petition for Condemnation herein." (Emphasis added).

This, then, is actually a "dual-purpose" condemnation which has little to do with the few elderly cases cited by Petitioner as authority on the issue of exclusively Federal purpose condemnation. The evidence showed that approximately six acres and all the buildings of the 13 acre parcel were retained by the City for warehouse and maintenance purposes. These buildings were formerly used by the Petitioner, Fruit Palace, for its principal activity, county fairs. The evidence showed that without these buildings, the county fair could not be conducted.

This is not, then, an attempted condemnation by a state agency for an exclusively Federal purpose.

In Texas, at least, so long as the land taken is for a public use, the amount of land taken is within the discretion of the condemnor. See, e.g., *Luby v. City of Dallas*, 396 SW2d 192 (Tex.Civ.App.-Dallas 1965, writ ref'd n.r.e.), ("surplus" condemnation permitted where remainder would have been unsuitable for any use). Accord: *Atwood v. Willacy County Navigation District*, 271 SW2d 137, 141

(Tex.Civ.App.-San Antonio 1954, writ ref'd n.r.e.), (appeal dismissed 350 US 804 (1955)), ("the property use of the power of eminent domain is exceeded when and only when the municipality condemns land for a *use unconnected with its legitimate purposes*, and simply in order to meet the cost of its proper objectives.") (Emphasis in original.) Thus, the key issue in Texas regarding condemnation is not the amount of land taken by the condemnor, but whether a public use exists for the parcel, and if so, whether the amount of land taken is arbitrary and capricious. *See Massie v. City of Floydada*, 112 SW2d 243 (Tex.Civ.App.-Amarillo 1938, no writ). In view of the fact that there exists a valid and unchallenged state purpose for the five plus acres of the leasehold estate of the Fruit Palace, which contains all the buildings, the acquisition of the leasehold on the remaining seven acres rendered useless should not be subject to challenge.

Respondent City respectfully submits that Petitioner is incorrect in its position that the City has violated the U.S. Constitution by condemning a portion of the leasehold remainder for sale under contract to the U.S. Postal Service.

Texas Local Government Code, §280.001, specifically authorizes the acquisition by a Texas city of land for use by the United States Government. There is no limitation on the uses for which a city may condemn for the purpose of conveying to the Federal Government.

State Court opinions, in a minority of states, pay lip service to a supposed distinction between the right of States and their subdivisions to condemn for what are deemed to be "State" purposes and the right to condemn for "Federal" purposes. No recent case has denied the right of a state or local government to condemn for such so-called "Federal" purposes; this distinction actually arose at a time when the

power of eminent domain of the Federal Government was much in doubt. It appears that, in order to strengthen the authority of the Federal Government to condemn property, a necessity for the exercise of this power solely by the Federal Government was postulated.

By 1875, the right of the Federal Government to condemn land situated within the several states, with or without the consent of the state, had been established. See *Kohl v. United States*, 91 US (1 Otto) 367, 371 (1875). However, before the extent of the constitutional powers of the Federal Government was fully recognized, it was customary, when the Federal Government desired to acquire property within the boundaries of a state, for the taking to be effectuated by the state or one of its political subdivisions under authority of state statute and the property thereafter sold or given to the United States. 26 Am. Jur., *Evidence* §12 n.13 (1966). When this practice (municipal condemnation for the benefit of the Federal Government) was eventually challenged, it was sustained in a majority of states on the ground that the taking was for a valid public use because the benefit derived from the project/condemnation was shared by the state. *See Reddall v. Bryan*, 14 Md. 444 (1859). See also *Burt v. Merchants' Ins. Co.*, 106 Mass. 356 (1871) (state statute authorizing the United States to appropriate a site for a post office and treasury building sustained because purpose was exclusively public.) Thus, the general rule regarding condemnation by a state or political subdivision on behalf of the Federal Government is that the exercise of the power of eminent domain by a state, or under the authority of a state, is not invalidated by the fact that the power is exercised for the benefit or use of the United States. The practice was sustained in some states on the ground that the public work for which the taking was made, although to

be controlled and managed by the United States, was for the use and benefit of the people of the state in that they shared in the benefit.

When, as a matter of fact, the benefit is actually shared by the state, the weight of authority is still to the effect that a state may acquire title to lands on behalf of the United States. 1 Nichols, *Eminent Domain* §2.113 (Sackman rev. ed. 1988). Where for example, the state acquires land for the purpose of granting it to the United States for defense purposes, the state, having an interest in defense, secures attainment of the objective by transferring to the Federal Government the means to perform itsnational defense objectives. It has also been held that when land is taken by the state for a lawful state purpose, the fact that the state intends to turn the land over to the United States to better effectuate the object of the taking is no objection to the validity of the taking. See, e.g., *Richardson v. Cameron County, Texas*, 275 SW2d 709 (Tex.Civ.App.-San Antonio 1955, no writ) (State may permissibly grant county power to condemn property and convey same to the United States for flood control); *Vann v. Cameron County, Texas*, 124 SW2d 167 (Tex.Civ.App.-El Paso 1939, writ dism'd) (Proceeding by county to condemn right of way for flood control and to convey it to the Federal Government was upheld on the basis of statute authorizing cooperation with the United States for flood control). See, Annot., "Power of eminent domain as exercisable by state or one of its political subdivisions for benefit of Federal Government, or by Federal Government exclusively under state authority," 143 A.L.R. 1040, 1042 (1947) (collecting authority). *Accord*, 26 Am.Jr.2d, *Eminent Domain* §12 (1966).

The contrary authority relied upon by the Fruit Palace holds that a state may not exercise its power of eminent domain on behalf of the Federal Government in connection

with purposes which are *exclusively* national in character. See, Nichols, *Eminent Domain*, §2.113 (Sackman rev. ed. 1988). The rationale behind this minority rule is that the power of eminent domain in any sovereign exists only for its own purposes, and the appropriation of lands for exclusively national objectives is not among the ends contemplated in the creation of the state government. *People ex rel. Trombley v. Humphrey*, 23 Mich. 471, 9 Am.Rep. 94 (1871). The Supreme Court of the United States has, in *dictum*, approved this minority rule as based on the "best reasoning." *Kohl v. United States*, 91 US (1 Otto) 367, 373 (1875). Where, however, at least a partial benefit accrues to the state, such condemnation on behalf of the Federal Government has universally been recognized to be valid. *Via v. State Commission*, 9 F.Supp. 556 (W.D.Va.), aff'd, 296 US 549 (1935).

The case of *State v. W. Tin Yan*, 44 Haw. 370, 44, Haw. 464, 355 P2d 25 (1960), is illustrative. Hawaii brought a condemnation proceeding to condemn certain lands for the purpose of donating them to the United States to enlarge the Hawaii National Park. The land owner challenged the condemnation as not being for a public purpose because the condemnation and project were being undertaken on behalf of the United States. In rejecting this argument, the court said:

> "[12] The general rule and majority view that a state may properly exercise its power of eminent domain for the benefit and use of the United States, as set forth in the Annotation, 143 A.L.R. 1040, 1042, has been refined so 'that the state may not exercise its power of eminent domain on behalf of the United States in connection with uses which are exclusively national in character, such as

post offices, custom houses or federal courts, but such condemnation may be had where a partial benefit at least, accrues to the state.' 1 Nichols, *Eminent Domain*, 3d ed., §2.113-[3], p. 111; *Via v. State Commission* On Conservation, etc., D.C.W.D.Va. 1935, 9 F.Supp. 556, affirmed 296 U.S. 549, 56 S.Ct. 245, 80 L.Ed. 388. In the *Via* case, it was held that a taking of land by the state for the purpose of then conveying it to the United States for a national park was a valid taking.

> '... The power [of eminent domain] exists, in any state, for the promotion of the safety, convenience, welfare, and happiness of the people of that state. Conceding that the power of eminent domain must be exercised by a state only in connection with some public function of that state, it must also be conceded that the furtherance of the health, pleasure, and recreational facilities of its people is a function of the state. If this be true, and it undoubtedly is, is the right of the state to perform this function, to accomplish this purpose, to be denied because the manner of its accomplishment involves the cession to the federal government of land which the latter agrees to maintain for this purpose? Is the

> state in the performance of a legitimate function forbidden to accomplish it through such means or agency as it chooses? We think not.

9 F.Supp. 556, at page 562. See also *State v. Oliver*, 162 Tenn. 100, 35 SW2d 396 (1931); *County of San Benito v. Copper Mountain Mining Co.*, 7 Cal.App.2d 82, 45 P.2d 428 (1935).

Public Law 171 states that:

> the tracts of land on the island of Hawaii and on the island of Maui, in the Territory of Hawaii, hereinafter described, shall be perpetually dedicated and set apart as a public part or pleasure ground for the benefit and enjoyment of the people of the United States, ...'

> "This provisions applied to the lands in question by virtue of Section 4, of Public Law 680. It is thus clear that Hawaii and its people, as 'people of the United States,' will obtain benefit and enjoyment from the instant action, which is a proper exercise of the Territory's power of eminent domain for public use.

"Accordingly, the judgment appealed from is affirmed."

The only case Petitioner can find which holds that a state may not condemn lands on behalf of the Federal Government is *People ex rel. Trombley v. Humphrey*, 23 Mich. 471, 9 Am.Rep. 94 (1871). In *Trombley*, the Michigan legislature authorized the Governor to condemn lands for the purpose of conveying them to the Federal Government for erection and maintenance of lighthouses. After the award, the Federal Government refused to accept the property. The landowner sued the state to require it to proceed and the State defended on the ground that it had no authority to condemn because only the Federal Government could do so. The court found that no Public "necessity" existed, because the Federal Government had ample condemnation authority of its own. Further, because the eminent domain power existing in the state was narrowly construed so as to be used only for state purposes, and no other, the court found that the state's exercise of power outside its "sphere of sovereignty" was not among the ends contemplated in the creation of the state government. The Court, although requested, refused to speculate on what outcome might be reached if the state had proclaimed an interest or state purpose, thus leaving open the possibility that the result would be different if there were a dual use.

The United States Supreme Court, in an action reviewing an act of Congress authorizing acquisition of land in Ohio by condemnation for a post office, analyzed the powers of Congress to authorize such procedures and concluded that the state need not give its consent. *Kohl v. United States*, 91 US (1 Otto) 367 (1875). In *dictum*, however, the court reviewed decisions involving state condemnation of lands for the use of the Federal Government including *Trombley*, and found that Trombley was "founded, we think, upon better reason." *Kohl* at 373. The Court stated:

> The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity; which alone is the foundation of the right. If the United States has the power, it must be complete in itself. It can be neither enlarged nor diminished by a state. Nor can any state prescribe the manner in which it must be exercised. The consent of a state can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and the right of exclusive legislation after the land shall have been acquired.

Id. at 373-74. Although the Court's comments should be read in the context of their discussion--the powers of the Federal Government--subsequent commentators have seized on these remarks as advancement of the "Trombley doctrine." See, 29A C.J.S., *Eminent Domain* §19 (1965); 1 Nichols, *Eminent Domain* §2.113. The Supreme Court's approbation was dicta at best and was made primarily in support of the proposition directly involved that the Federal Government has the power to condemn land for its own use without the consent of the state. See *Via v. State Commission*, 9 F.Supp. 556 (W.D.Va.), aff 'd, 296 US 549 (1935). It is also worthy of note that the cases finding an absence of a right to condemn all occurred long before the expanded view of the right of eminent domain expressed in *Berman v. Parker*, 343 US 26 (1954).

Various cases have determined whether or not state condemnation is for an *exclusively* Federal purpose. See, e.g., *Via v. State Commission*, 9 F.Supp. 556 (W.D.Va.),

aff'd, 296 US 549 (1935) (state condemnation on behalf of Federal Government for a national public park upheld); *Rockaway Pacific Corporation v. Stotesbury*, 255 F. 345, 352 (2d Cir. 1917) ("the power to condemn sites for forts, lighthouses, post offices, and customs houses is in the United States, and when property is needed for the purposes specified, it should not be condemned by the state, as it is not being taken for public use"). Interestingly, the *Rockaway* court held this principal not applicable where the property was to be taken "for the defense of lives and property of the citizens of the state as well as citizens of the United States." *Id.* Note also the strong dissent arguing that there is no difference between state or federal condemnation as defense of the nation is a public purpose. Thus, there are many decisions which permit state condemnation for non-exclusive federal purposes. See generally, *Schooler v. State*, 175 SW2d 644 (Tex.Civ.App.-El Paso 1943, writ ref 'd w.o.m.) (national park purposes); *Delfield v. Tulsa*, 191 Okla. 541, 131 P.2d 754 (1942) (aircraft manufacturing plant); *Fishel v. City and County of Denver*, 106 Colo. 576, 108 P.2d 236 (1940) (pilot training school); *San Benito County v. Copper Mountain Mining Co.*, 7 Cal.App.2d 82, 45 P.2d 428 (1935) (public park). See generally, Annot., 143 A.L.R. 1040, 1042 (1947).

A question relevant in this case is whether there is authority for a state to condemn for a project which involves both Federal and state purposes, e.g., a government center or complex housing a regional post office and various city offices, or a single building which houses both the Federal District Court and State circuit courts. In other words, may the Federal Government and State Government cooperate in acquiring property by condemnation and thereafter jointly occupy and use the property? The answer is apparently, yes, where the condemnation is undertaken by the Federal Government or the Federal Government "loans" the state its

condemnation powers. See, e.g., *City of Tacoma v. Taxpayers*, 357 US 320 (1958) (city as licensee of Federal Power Commission acquired Federal eminent domain power and capacity to take property to construct a dam); *City of Davenport v. Three-fifths of An Acre of Land*, 147 F.Supp. 794 (S.D.Ill. 1957), aff 'd, 252 F2d 354 (7th Cir 1958) (delegation of Federal eminent domain power to municipality upheld in connection with construction of a bridge over a Federal navigable waterway); *United States v. Certain Parcels of Land*, 209 F.Supp. 483 (S.D.Ill- 1962), aff'd, 314 F2d 825 (7th Cir. 1963), *United States v. Pleasure Diveway & Park Dist.*, 314 F2d 825 (7th Cir. 1963) (condemnation action instituted by Federal Government at request of state upheld despite fact that state could not have condemned property in its own name); *Eden Memorial Park Association v. Department of Public Works*, 59 Cal.2d 412, 29 Cal.Rptr. 790, 380 P.2d 390 (1963) (condemnation for federal highway upheld despite state law prohibiting condemnation of cemetery property for highway purposes).

It is universally established that private property may constitutionally be taken by eminent domain only for a public use. *Hawaii Housing Authority v. Midkiff*, 467 US 229 (1984); *Dyer v. Texas Electric Service Co.*, 680 SW2d 883, 884-85 (Tex-App.-El Paso 1984, writ ref 'd n.r.e.); *Tenngasco Gas Gathering Co. v. Fischer*, 653 SW2d 469 (Tex.Civ.App.-Corpus Christi 1983, writ ref 'd n.r.e.). Although "public use" is incapable of a precise and comprehensive definition, a presumption exists that a use is public if the legislature has declared it to be such, and should be treated with great consideration from the judiciary. *Housing Authority v. Higginbotham*, 135 Tex. 158, 143 SW2d 79, 85 (1940); *Hawaii Housing Authority v. Midkiff*, 467 US 229 at 244 ("if a legislature, state or federal, determines there is a substantial reason for an exercise of taking power, courts must defer to its determination that the taking will serve a

public use.") See also *Berman v. Parker*, 348 US 26, 32 (1954) ("when the legislature speaks, the public purpose has been declared in terms "well-nigh conclusive.")"

In many instances, state constitutions extend the object of eminent domain to what would be considered a private use, by declaring it to be of public importance. See 21A Nichols, *Eminent Domain* §7.15 (1987); *Texas* Constitution Article XI, §7 ("Irrigation of agricultural lands is hereby declared to be a public purpose.") Further, many states delegate the power of eminent domain to political subdivisions or agencies, public service corporation, and/or private corporations. *Atwood v. Willacy County Navigation District*, 271 SW2d 137 (Tex.Civ.App.-San Antonio 1954, writ ref'd n.r.e.), appeal dismissed 350 US 804 (1955) (judicial deference to determination that acquisition of land around public facility was for a public use and purpose); *West V. Whitehead*, 238 SW 976 (Tex.Civ.App.-San Antonio 1922, writ ref'd) (upholding a private railroad's power to exercise eminent domain). See 21A Nichols, *Eminent Domain* §7.18-19 (1987). Clearly, if judicial review is narrow where condemnation results in private use of property, at least the same deference must be allowed where a Federal "public use" results from state condemnation. See *Davis v. City of Lubbock*, 160 Tex. 38, 326 SW2d 699 (1959). Unlike *Trombley*, the United States Postal Service in this case is asserting its desire to have the property; indeed it already has it.

Petitioner claims to be affronted by USPS' willingness to allow the City to get it land; it is difficult to follow the floodgates alarms raised by Petitioner over this supposed constitutional issue.

Even if the acquisition of land for a post office is deemed to fall within the purview of a solely *federal use*, the activity should nevertheless be determined to advance or serve a valid *state purpose* because of the obvious local benefit derived from such activity. "It is undoubtedly the law that land can be acquired by eminent domain for the site of a . . . post office . . . or for similar structures, in which the affairs of the government are administered." 21A Nichols, *Eminent Domain* §7.20 (1987) (citing *Kohl v. United States*, 91 US (1 Otto) 367 (1875)). See also *Burt v. Merchants' Ins. Co.*, 106 Mass. 356, 363 (1871) ("No intelligent person can suppose that the state is not interested in the establishment of lighthouses, navy-yards and arsenals within its limits, quite as much as the United States. And as to a post office in the City of Boston, the people of that city are peculiarly interested in it. The whole Commonwealth is interested in it; and it is established by the United States for a purpose *exclusively public. It is difficult to conceive of a more proper case for the exercise of the rights of eminent domain.*" (Emphasis added).

The above discussion argues the existence of a state public purpose even where utilized to acquire land for exclusive Federal use. Where, as here, there is also a legitimate state use - warehouses, etc., there is simply no authority for invalidation of the taking.

CONCLUSION

The Respondent, City of Palestine, as a Texas City, was empowered under §251.001, Texas Local Government Code, to condemn Petitioner's leasehold estate remainder for use for City equipment barns, warehouses and offices and under §280.001 et seq., Texas Local Government Code for conveyance of a part hereof to the U.S. Government for use for a regional postal facility. Such uses are all public uses and the Court of Appeals did not err in affirming the trial court's ruling to this effect.

Respectfully Submitted,

STAPLES & HAMPTON

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APPENDIX A

FILED FOR RECORD
_____ O'clock ___M.
SEP 25 1987
LULU F. NATION
DISTRICT CLERK, ANDERSON COUNTY, TEXAS
BY _____ DEPUTY

CITY OF PALESTINE, TEXAS		PROCEEDINGS IN EMINENT DOMAIN
VS.	*	THIRD JUDICIAL
	*	DISTRICT COURT
TEXAS FRUIT	*	ANDERSON COUNTY,
PALACE, INC.	*	TEXAS

ORDER

The foregoing Motion for Writ of Possession, having been presented to the Court, and the Court having heard and considered the same and the evidence and argument of counsel in connection therewith, and it appearing to the Court that by their written Award filed herein the Special Commissioners duly appointed by this Court having duly qualified awarded to Defendant, TEXAS FRUIT PALACE, INC., the amount of One Hundred Sixty Thousand and NO/100 ($160,000.00) Dollars as damages by reason of the condemnation herein, that Plaintiff has paid all costs awarded against it, has deposited into the registry of this Court, subject to the order of said Defendant, the amount of damages awarded and adjudged against it by said Special Commissioners, in accordance with the provisions of Section 21.021, Vernon's Texas Codes Annotated, as amended, and that Plaintiff is entitled to immediate possession of that

certain property described in Exhibit "A" attached hereto and made a part hereof for all purposes, pending the final determination of this proceeding.

It is accordingly ORDERED, ADJUDGED and DECREED that the Clerk of this Court shall issue a Writ of Possession in favor of Plaintiff to effect delivery of the immediate possession of said property to said Plaintiff as against said Defendant, TEXAS FRUIT PALACE, INC., and all persons claiming by, through or under them since the filing of this proceeding, and commanding the sheriff or any constable in the State of Texas to remove therefrom all persons and their personalty, if any, situated thereon, to the end that Plaintiff, its authorized agents, employees, servants and independent contractors may at once enter upon said property described in Exhibit "A" for the purpose of conveying a portion of the property to the United States Government for a regional postal facility and for the location of city offices, city warehouses, city equipment barns, city maintenance garages, city storage yards, city indoor storage buildings, parking facilities, and streets and alleys, as described in its written Statement and Petition for Condemnation herein.

It is further ORDERED, ADJUDGED and DECREED that the Clerk, if said One Hundred Sixty Thousand and No/100 ($160,000.00) Dollars, is not withdrawn by Defendant, Condemnee, TEXAS FRUIT PALACE, INC., on or before 10 days from the date of this Order, that the Clerk deposit the One Hundred Sixty Thousand and No/100 ($160,000.00) Dollars into interest bearing accounts in state or national banks in Texas so that all funds will be F.D.I.C. insured and that the Clerk pay the interest earned on such amounts to Plaintiff, Condemnor, CITY OF PALESTINE, as interest accrues.

SIGNED and ENTERED this 25th day of September, A.D., 1987.

/s/ Sam Bournias
Judge of the 87th Judicial
District Court of
Anderson County, Texas

APPROVED AS TO FORM:

/s/ Charles W. Nichols
Attorney for Plaintiff,
CITY OF PALESTINE

Attorney for Defendant,
TEXAS FRUIT PALACE, INC.

EXHIBIT "A"

Description of "The Fair Grounds"

BEING 13.034 acres in and out of the S.G. Wells League, A-65, and the Jacob Snively, A-63, Anderson County, Texas, and being portions of a 9.53 acre tract described in a Sheriff's Deed No. 25575 to the City of Palestine in deed dated March 2, 1921, and recorded in Volume 135, Page 467, and a 6.92 acre tract conveyed by Thomas L. Camp et al to the City of Palestine in deed dated March 10, 1936 and recorded in Volume 267, Page 91, both of the Deed Records of Anderson County, Texas, said 13.034 acre tract is more particularly described by metes and bounds as follows, to-wit:

BEGINNING at an iron rod set at the southwest corner of the 9.53 acre tract referred to above, same being the intersection of the north margin of West Coronaca Street and the east line of a 12' wide alley;

THENCE North 11°32'37" West with the east line of said 12' wide alley, same being the west line of 9.53 acre tract, a distance of 198.05 feet to an iron rod set for corner;

THENCE North 82°28'27" East along a fence a distance of 215.16 feet to an iron rod set for corner;

THENCE North 45°28'51" East continuing with said fence 138.78 feet to an iron rod set for corner;

THENCE North 4°53'23" East along said fence a distance of 179.71 feet to an iron rod set for corner;

THENCE North 16°08'18" West continuing with said fence a distance of 159.88 feet to an iron rod set in the south

margin of Kickapoo Street, same being the north line of the 9.53 acre tract referred to above;

THENCE North 77°44'07" East with the south margin of Kickapoo Street and the north line of the 9.53 care tract a distance of 272.61 feet to an iron rod set for corner;

THENCE South 10°51'43" East a distance of 68.72 feet to an iron rod set for corner at the northwest corner of the 6.92 acre tract referred to above;

THENCE North 75°04'31" East with the north line of said 6.92 acre tract a distance of 499.28 feet to its intersection with the west right of way line of State Highway No. 155;

THENCE in a southerly direction with the east right of way line of State Highway No. 155 the following courses: South 9°00'20" West, 331.76 feet; South 0°27'05" East, 205.66 feet; and South 8°39'23" East, 250.75 feet to an iron rod set for corner in the south line of the 6.92 acre tract;

THENCE South 82°39'50" West with said south line of 9.62 acre tract a distance of 342.85 feet to an iron rod set in the west margin of North Cedar Street;

THENCE North 12°59'21" West with the west margin of North Cedar Street a distance of 60.17 feet to an iron rod set for corner, same being at the intersection of the west margin of North Cedar Street and the south margin of West Coronaca Street;

THENCE South 85°05'00" West with the south margin of West Coronaca Street a distance of 428.63 feet to an iron rod set for corner and bearing North 85°05'00" East, a distance of 50.00 feet from the intersection of the south margin of West Coronaca Street with the east margin of North Laura Street;

THENCE North 4°55'00" West a distance of 50.00 feet to an iron rod set in the north margin of West Coronaca Street, same being the south line of the 9.53 acre tract referred to above;

THENCE South 85°05'00" West with the north line of the 9.53 acre tract, same being the north line of West Coronaca Street a distance of 208.58 feet to the PLACE OF THE BEGINNING, and containing 13.034 acres.